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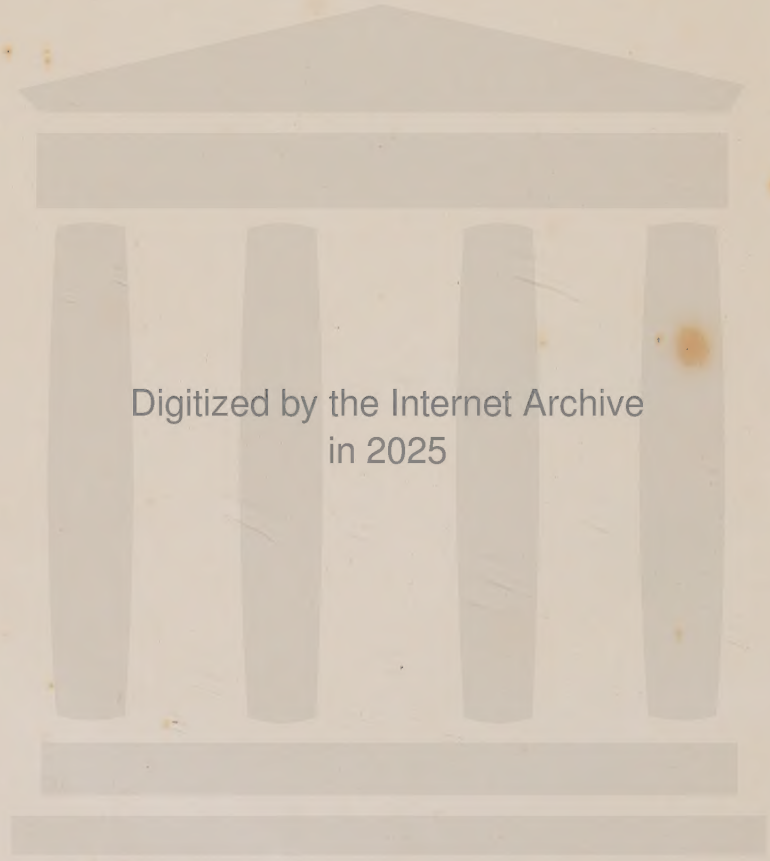
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SELECTION

OF

PRECEDENTS,

FROM

THE BEST MODERN MANUSCRIPT COLLECTIONS

AND

Drafts of Actual Practice;

WITH

GENERAL COMMON FORMS, AND VARIATIONS

ADAPTED TO ALL THE CIRCUMSTANCES USUALLY OCCURRING;

FORMING A

SYSTEM OF CONVEYANCING;

WITH

DISSERTATIONS, AND PRACTICAL NOTES.

By the late W. M. BYTHEWOOD, Esq.
of Lincoln's Inn, Barrister at Law.

The Second Edition,

CORRECTED, WITH ADDITIONS,

By JAMES STEWART, Esq.
of Lincoln's Inn, Barrister at Law.

VOL. III.

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gagor and mortgagee in possession.

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Respecting claims under a will, and matters of account.

(deducting certain Sums as to Children he had advanced) : J. B. P., the only acting Trustee, having paid varions Sums to his Brothers in Part of their Shares, and having delivered to C. P. Part of the Farming Stock, &c. and there being a Dispute as to the Sum to be allowed by C. P. : and J. B. P. and T. P. having had Dealings together in Trade, as to which Disputes had arisen, all the Parties had agreed to refer the Executorship Accounts, and all other Differences between them, to the Award of the two Arbitrators, or an Umpire then named by the Parties ; and the Parties having enlarged the Time for the Arbitrators making their Award ; and it appearing to them, that the whole of the Real and Personal Estates had been converted into Money, (except a Piece of Copyhold Land, and a Leasehold Dwelling House,) That J. B. P. shall, within one Month, surrender to J. G. and F. his Wife, in Fee, the Piece of Copyhold Land ; the Value whereof the Arbitrators have deducted from their share : that J. B. P. shall, within one Month, assign to E. P. the Leasehold Dwelling House ; and that E. P. shall be entitled to the Rents from Lady Day last ; the value whereof the Arbitrators have deducted from her Share : that J. B. P. shall forthwith pay G. P., I. G., and F. his Wife, S. P. and T. P., several specific Sums : that J. B. P. shall forthwith give E. P. a Bond, with two Sureties named, for securing her Share, with Interest, within Twelve Months : that J. B. P. shall forthwith give to R. P. an Infant, or to her Appointee, a Bond, securing her Share, with Interest, within Three Years ; the Interest to be paid half yearly to the Mother, for R. P.'s Use : that the Bonds shall be prepared at J. B. P.'s Expense : that C. P. shall forthwith pay J. B. P. the Sum found to be due from him, after deducting his Share under the Will : that J. B. P. shall forthwith pay the Expenses of the Reference and Award ; the Arbitrators having made him an Allowance for that purpose : that all Parties entitled to receive Money under the Award, shall give proper Receipts ; and, if requir-

ed, give a General Release to the Person paying such Money, but at his Expense: Proviso, that if the Representatives of an Attorney should recover a certain Sum, claimed of the Executor, (but which the Arbitrators believe to be unjust) then Seven-Eighths of the Sum recovered, and of the Costs, shall be paid to J. B. P. by each of the other Parties: Proviso, that if T. P. should be compelled, as Acceptor, to pay a Bill drawn by J. B. P., then J. B. P. shall repay him the same. - - - Page 67

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Under order of nisi prius: good cause of action by executors, payments, &c.

and Costs awarded be not duly paid; but to be a Security only for such Sums and Costs as shall not be duly paid, with the Costs of entering Verdict, &c. With respect to the Action, by the bye, that the Plaintiffs had good Cause of Action against the Defendant for 190*l.*, due to the Testator: And with respect to the Chancery Suit, that the Defendant shall cause his own Bill to be dismissed, with Costs to be taxed, and to be paid by him to the Plaintiffs: that all Proceedings in Law and Equity shall be stayed: that the Defendant shall pay the Plaintiffs, at, &c. the Sums awarded, with the Costs of both Actions, and the Costs of Reference and Award; the Costs to be taxed. Recital, that pending the Reference, an Exchequer Bill for 400*l.* has been purchased with Defendant's Money, and deposited to abide the Event of the Award; Further Award, that the Exchequer Bill, and all other Bills received in Exchange for it, be sold by 10th December; the Produce, and all Benefit of the Bills, to be paid to the Plaintiffs as Part of the Money and Costs awarded: That the Plaintiffs shall accept the Money and Costs awarded, in full of all Demands, as Executors, upon the Defendant. 119

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Award under an Order of Nisi Prius, in the Common Pleas, whereby the Jury was directed to find a Verdict for the Plaintiff for Pounds Damages, subject to a Reference of all Matters in Difference; so as the Arbitrator made his Award by a given Day, or any other Day to which he shall enlarge the Time: and it was awarded, that the Arbitrator might examine the Parties upon Oath; and that the Parties and Witnesses might be sworn before a Judge of the Court: that the Parties should produce before the Arbitrator, all Books, &c.: that the Costs of the Suit should abide the Event of the Award, and the Costs of Reference be in the Arbitrator's Discretion:—That the Plaintiff had no Cause of Action: that instead of the Verdict and Damages for the Plaintiff, a Verdict be entered for the Defendant: and that the Plaintiff and Defendant shall bear their own Costs of the Reference, and of the Award. Page 127

Under order of nisi prius in C. P., plaintiff no cause of action.

Award after an Action against a Sheriff, on a Reference of all Matters in Difference between the Parties, by a Judge's Order, pursuant to the Terms of an Agreement between the Parties, set forth in the Order, and reciting, that the Plaintiff claims a House, Furniture, &c. under a Bill of Sale, and an Assignment of the Lease: that another claims the Value of the Furniture under a *fi. fa.* on which the Furniture has been seized by the Sheriff, who has had joint Possession with the Plaintiff, being indemnified by Claimant: and the Agreement being that the Plaintiff shall have entire Possession; and the Claims referred to an Arbitrator; if he should determine that the Claimant is entitled to the Value, the Plaintiff undertakes to pay the same; if he should determine that the Plaintiff is entitled, the Arbitrator to award Damages to the Plaintiff, to be paid by the Claimant; the Costs of the Arbitration, &c. to be paid by him, who shall be declared not to be entitled; so as the Award be made by a given Day; but the Time was several Times enlarged by the Court, with the Consent of the Parties;

Under judge's order on agreement, of right to furniture and damages.

—That the Claimant had no Right to the Furniture, but that the Plaintiff was entitled: and that the Claimant pay the Plaintiff One Shilling Damages. 129

Under judge's order, of payment to plaintiff, &c.

Award under a Judge's Order, that a Cause in the King's Bench should be referred to Arbitration; that the Costs of the Cause, Reference, and Award, should be in the Arbitrator's Discretion; and that the Arbitrator might examine the Parties and Witnesses on Oath, to be sworn before a Judge of the Court, or a Commissioner: That the Defendant pay the Plaintiff, at, &c. a certain Sum: that it be received by the Plaintiff, in full satisfaction of all Matters referred: that each Party pay his own Costs of the Cause, and Reference; and that the Costs of the Award be paid equally. 132

Under judge's order, of payment, general release, &c.

Award under a Judge's Order, whereby a Cause was referred to one Arbitrator; the Costs of the Action to abide the Event of the Award; the Costs of Reference to be in Arbitrator's Discretion; the Parties and Witnesses to be examined on Oath, to be sworn before a Judge of the Court, or a Commissioner; the Parties to produce all Books, &c. and the Order to be made a Rule of Court: That the Proceedings in the Cause shall cease: that the Defendant shall pay the Plaintiff, or his Attorney, a certain Sum, in full of all Demands in the Cause: that on Payment thereof, the Plaintiff shall, if required, at the Defendant's Costs, execute a General Release: and that the Plaintiff and Defendant shall each pay his own Costs of the Reference, and of the Award. - - 136

Under order by Lord Chancellor, of balance of account.

Award by an Umpire, under an Order by the Lord Chancellor, whereby a Chancery Cause was referred to the Solicitors for the Parties, who, in case of Difference, were to choose an Umpire; that the Balance due to the Defendant was 348*l.*: and 200*l.* having been paid him by the Plaintiff, since the Order of Reference, that the Balance now is 148*l.* - - 139

No claim on

Award under an Order of Reference, that the Plaintiff has

no Claim on the Assignees of a Bankrupt, in respect of a certain Ship; or for any Monies lent the Bankrupt, or expended on the Ship: that the Plaintiff never had any Title to the Ship: that the Plaintiff shall on demand deliver to the Assignees all Papers relating to the Ship: and that the Assignees permit the Plaintiff to prove a certain Sum under the Commission, as a Debt due from the Bankrupt. - Page 140

bankrupt's assignees as to a ship, but plaintiff to prove a debt.

Award on a former Award being sent back to the Arbitrator for his Reconsideration; reciting an Order of Nisi Prius, whereby the Jury was ordered to find a Verdict for the Plaintiff, with Costs, subject to a Reference of all Matters in Difference in the Cause: that the Costs of the Cause should abide the Event of the Award: that the Costs of the Reference should be in the Arbitrator's Discretion: the Order afterwards made a Rule of the Court of King's Bench: several Enlargements of the Time for making the Award: that the Arbitrator ordered the Defendant to pay the Plaintiff a certain Sum: a Rule calling on the Defendant to shew Cause why an Attachment should not issue against him, for Nonperformance of the Award: a Rule whereby the Rule to shew Cause was enlarged, the Defendant consenting to go before the same Arbitrator, who was to reconsider the amount of Damages; so as the Sum then awarded should be invested in Exchequer Bills, and deposited at the Bank, in the Attornies' Names, and paid to the Plaintiff's Attornies either wholly or partly, according to the second Award: Enlargement of the last Rule, and of the Time for making the Award: the Costs of the further Reference and Award to be in the Arbitrator's Discretion: Confirmation of former Award: the Exchequer Bills to be delivered to the Plaintiff's Attornies; and the Defendant to pay the Plaintiff's Attornies the Costs of the Second Reference and Award; such Costs to be first taxed. 143

Confirming former award, sent back for reconsideration.

Deed of Covenants by a Lessee, in pursuance of an Award to farm during the Remainder of a Term according to

Covenant to perform award as to course of

husbandry, payments, &c. the Course of Husbandry mentioned in a Schedule: and every Year during the Remainder of the Term to feed off at least Sixty Acres of Meadow or Pasture Ground; and at the End of the Term, to leave the Lands directed in the Schedule to be left in Turnips, in an Husbandry-like Manner, sown with Turnips, twice properly hoed; the Lessee being paid for the same at the Valuation of two Referees, or their Umpire: and at the end of the Term, to leave all the Hay which shall arise in the last Year of the Term properly stacked; the Lessee being paid for the same at the Valuation of two Referees, or their Umpire: during the Remainder of the Term, to keep all the Covenants of the Lease (except such as are altered by these Presents); and in every respect to perform the Award; and to perform all such Acts, and make all such Payments, as are thereby directed to be done and made by him. - - Page 149

Release of all demands, except warrant of attorney. Release by a Mortgagee to a Mortgagor of all Actions and Demands, pursuant to the Direction of an Award; excepting a Warrant of Attorney, directed by the Award to be given by the Mortgagor to the Mortgagee. - - - - 155

Release of all demands, except right to redeem. Release by a Mortgagor to a Mortgagee, of all Actions and Demands, pursuant to the Direction of an Award; excepting his Right to redeem, in the manner prescribed by the Award. - - 156

BANKRUPTCY.

For Bankruptcy, see title Trusts for Creditors.

BARGAIN AND SALE FOR A YEAR.

157

To precede a release to pre- Bargain and Sale for a Year, adapted to a Common Ap-

pointment and Release, or a Release alone, to Uses to prevent Dower; or to a Release in Fee at Common Law. - - - Page 166 — vent dower, or a release at common law.

Bargain and Sale for a Year, to precede a Release of an Estate in Possession, or of a Reversion or Remainder in Fee by several, either to Uses to prevent Dower, or to the Trustees of a Settlement, or to a Mortgagee, or Grantee of an Annuity, with Trusts for Sale, &c. 169 — To precede a release of the possession or reversion by several, to uses to prevent dower, or to trustees, &c.

Bargain and Sale for a Year, to precede a Release of an Estate for Lives, or for the Life of the Vendor, either to the Purchaser, or to the Trustees of a Settlement. 172 — To precede release of estate for lives or life.

Demise for a Year at Common Law by a Corporation, to be perfected by the Lessee's Entry previous to the Release; with an Attestation and Memorandum of Entry. - - - - - 175 — Demise at common law by a corporation.

Memorandum of Entry to be endorsed on the Lease for a Year. - - - - - 177 — Memorandum of entry.

BARGAIN AND SALE IN FEE, &c.

Bargain and sale in fee, &c.

For Bargain and Sale in Fee, &c. see titles Purchase and Recovery; and Index to the Precedents, title Bargain and Sale.

BILL OF SALE.

Bill of sale.

For Bill of Sale, see titles Mortgage, and Purchase; and Index to the Precedents, title Bill of Sale.

BOND.

BOND for Payment of Money and Interest, either in one — Payment of money and interest.

Sum or by Instalments, and either with one, two, three, or more Obligors, or one, two, three, or more Obligees. - - - - - Page 179

Charge and agreement for mortgage on lands, indorsed on bond.

Indorsement on a Bond, whereby the Obligor charges Freehold and Leasehold Premises with the Money and Interest secured by the Bond, and a Judgment: and Agreement that he, his heirs, &c. will, at the Obligee's Request, execute a Mortgage of the Premises. - - - - - 198

Payment by four instalments.

Bond from one Obligor to two Obligees, for Payment of 1180*l.* by Four Instalments; which the Obligees have agreed to take in full discharge of a Debt of 3030*l.*, if the Instalments should be regularly paid, but not on Failure thereof: and Agreement by the Obligor, that if the Instalments are not duly paid, such Payments as shall be made shall only be a partial Discharge of the 3030*l.* - - - - - 199

Payment of principal at end of eight years, and interest in mean time.

Bond from One to One, for Payment of the Principal Sum at the end of Eight Years; and for Payment of Interest thereon in the mean time Quarterly: but if Default should be made in paying the Interest for Twenty-eight Days after each Quarterly Day, and after Demand, then the Whole of the Principal and Interest to become immediately due: with a Proviso, that the Bond is given on condition, that Notice of every Assignment shall be given to the Obligor's Solicitors, or otherwise the Obligation not to become forfeited, nor any Assignee be entitled to demand Principal or Interest. - - - 203

Payment of money lent under testator's authority to two of his executors.

Bond from Two Trustees and Executors of a Will to the Two other Joint Trustees and Executors, for the Payment of a Sum authorised by the Testator to be lent to the Obligors for a limited period; and for Payment of Interest in the mean time, until Payment of the Principal; the Principal and Interest to be paid according to the directions of the Will. - 205

Bond by two Legatees under a Will for Payment of an Annuity to the Widow of the Testator, for her Life, with a Proportional Part to the Time of her Decease, pursuant to, and in Satisfaction of a Condition, on which the Bequest to the Obligors was made. 207 — To pay an annuity, pursuant to the condition of a bequest.

Post Obit Bond, with a Surety, for securing a Sum to a Purchaser thereof, if the Vendor should survive his Father or Grandfather. - - - 209 — Contingent post obit, with surety.

Bond in consideration of a Release of a Debt for paying a Sum Post Obit the Obligor's Uncle, whether the Obligor be or be not then alive: the Sum secured being totally or partially redeemable in the interim. 227 — Post obit certain, but redeemable.

Memorandum of the Delivery of a Post Obit Bond to a Depositary, to be kept sealed during the Life of the Obligor's Uncle, unless previously redeemed; in order that the Obligor's Expectations from his Uncle may not be prejudiced. - - - 230 — Memorandum of delivering post obit bond to depositary.

Bond from Two Persons to London Bankers, to pay such Sums as the Bankers shall advance in answering Drafts or Bills to be drawn on them by a Mercantile Firm in the Country, not exceeding a certain Sum; And to indemnify the Bankers from all Losses, &c. on account of accepting and paying such Drafts or Bills. - - - - - 232 — To secure sums to be advanced in answering drafts, and to indemnify.

Bond from Two Sureties to London Bankers, for Payment of such Sums already, or to be hereafter advanced to Copartners, with Interest, as the Copartners shall not pay: but the Sureties to be only liable to a certain amount. - - - - 235 — By sureties, to pay sums already or to be advanced.

Bond from Two Sureties to Merchants, who have agreed to supply a Tradesman with Goods, conditioned to be void on Payment by Principal; or in case of his Default, on Payment by Sureties, Six Months after Notice, of such Sums not exceeding 1000*l.* as shall be due; but, if exceeding 1000*l.*, or if no such Notice shall be given, then that Sum. - 241 — Sureties for tradesman to a given amount.

Attorney and sureties to London agent. Bond from an Attorney in the Country and Two Sureties to his Agent in London, for securing Money due, and to become due on account. Page 243

To transfer stock after notice, and pay dividends in mean time. Bond for Purchasing and Transferring Navy Five per Cent. Bank Annuities, after Six Months' Notice, being the Amount of Stock sold for the Obligor's Benefit; and for paying the Amount of the Dividends in the mean Time. 245

To invest amount of debt in stock, and pay dividends in mean time. Bond to two Executors from two Persons who were Debtors by Bond to the Testator, for investing in the Names of the Executors, within a given Time, so much Stock Three per Cent. Consols, as the Amount of the debt would purchase at the Date of the Bond; and to pay the Amount of the Dividends in the mean Time - - - - 263

To replace stock on request, and pay dividends in mean time. Bond from Four to One, for replacing East India Stock on Request; and for paying the Amount of the Dividends in the mean time. - - 269

For paying legacies, after obligor's death, under direction of will. Bond from a Residuary Legatee to an Executor, for Payment of Legacies after the Obligor's Death, where a Testator gave several Legacies to be paid Six Months after the Death of the Residuary Legatee, with Interest from her Death; and directed her, within one Month from his Decease, to give a Bond to his Executors, for paying the Legacies accordingly; but if she neglected to give the Bond, he revoked the Bequest to her. - - - 273

From purchaser, for paying legacies charged on lands, and interest in mean time. Bond from the Purchaser to the Vendor of an Estate charged with Legacies, payable to two Infants, when they respectively come of Age, where it had been agreed, that Part of the Purchase Money, being the Amount of the Legacies, should remain in the Purchaser's hands,—for paying the Legacies as the Infants come of Age: and if both or either of them should die under Age, then to pay the Legacies or Legacy to the Vendor within Three Months: and for paying to the Vendor, Interest on the Legacies until they shall be respectively paid. - - 275

Bond from a Legatee to an Executor, on Payment of the whole Legacy, or a Part of the Legacy, to refund, if there should be a Deficiency of Assets. Page 277 — Legatee to refund on deficiency of assets.

Bond from the President, and Two of the Governors of a Workhouse, to Executors, to refund a Legacy given to the Workhouse, in case of Deficiency of Assets. 280 — Governors of workhouse to refund, on deficiency of assets.

Bond for the faithful Service of a Clerk, either to two Partners, or to them and their Executors or Administrators, and notwithstanding an Alteration in the Firm. - - - - 281 — Faithful service of clerk.

Bond to secure the Fidelity of Bankers' Chief Clerk. 286 — Fidelity of bankers' chief clerk.

Bond for the Good Behaviour of a Servant in a Trade. 288 — Fidelity of servant in trade.

Bond that neither the Obligor nor his Wife, who are to be employed as Servants, in carrying an Art invented for copying any Picture or Print, will disclose the Secrets thereof. - - - 289 — By servant, not to disclose an invention.

Bond from the Principal and Four Sureties, for the due Performance of the Offices of Assistant Overseer of the Poor, Collector of Taxes, &c. for the Collectors, &c. of a Parish, and Depositary of the Parish Books and Papers. - - - 295 — For fidelity as assistant overseer, collector of taxes, &c.

Bond from Three Trustees of an Assurance Society, to the Treasurer, for duly applying the Funds of the Society, according to the Directions of the Court of Directors; And to permit Suits or Actions to be brought in their Names, for Monies due to them, as Trustees for the Society, without becoming Nonsuit, &c. 307 — From trustees of assurance society.

Bond from the Treasurer of an Assurance Society, to the Trustees, for duly applying the Monies of the Society which shall come to his Hands; and to permit Suits — From treasurer of assurance society.

or Actions to be brought in his Name, for Monies due to him as Treasurer, without becoming Nonsuit, &c.; and to observe the Rules and Regulations of the Society, which he ought to perform as Treasurer. Page 310

To grant lease. Bond by a Tenant for Life, who had power to lease only for Twelve Years, but who had contracted to grant a Lease for Twenty-one Years, that at the end of Twelve Years, for which a Lease had been granted, the immediate Reversioner should, upon the Lessee's Request, grant another Lease for Nine Years, at the same Rent, and under the same Covenants, as was contained in the Lease for Twelve Years. - - - 312

For performance of contract for sale of infant's estate. Bond for Performance of a Contract for Sale of an Infant's Estate in Fee. - - - 314

To perform covenants. Bond for the Performance of Covenants - 316

To perform agreement. Bond for the Performance of an Agreement. - 318

With surety, to convey land sold. Bond from Two Vendors, and their Surety, to a Purchaser, for the Performance of the Vendor's Covenants to convey the Premises sold. - - 318

With two sureties, to perform contract for building, &c. Bond from Two Builders, and their Two Sureties, for the due Performance of a Contract for Building a School, and Altering and Repairing a House. - 320

To procure assignment of term. Bond from a Vendor to a Purchaser, to procure an Assignment of an Outstanding Term. - 322

For conveyance by infant, or his heirs, &c. and for quiet enjoyment in mean time. Bond from Four Obligors to a Purchaser, that an Infant, and those claiming through him, or his Mother deceased, shall, within Six Months after he attains Twenty-one; or in case of his Death previously, his Heirs, &c. or those claiming through him or his Mo-

ther, shall convey Freehold, and surrender Copyhold, Lands; to an undivided Part of which the Infant is entitled, in common with the Obligors; and of which a Conveyance and Covenant to Surrender to the Purchaser has been executed by the Obligors, the Infant, and Others, by Indentures of even Date: and the Obligors and Infant have been paid their Shares of the Purchase Money: and that, in the mean time, the Purchaser, his Heirs, &c. shall quietly enjoy the Premises, without any Interruption from the Infant, his Heirs, &c. or those claiming through him or them, or through his Mother deceased. - Page 234

Bond on a Conveyance by Devisees in Trust for Sale, to a Purchaser, that the Devisor's Four Infant Sons, who are beneficially interested in the Purchase Money, shall severally, on attaining Twenty-one, convey to the Purchaser. - - - 344 — That four infants shall convey on severally coming of age.

Bond from a Vendor to a Purchaser, that he will at his own Expense, within Months, procure the Heir, or Co-heirs of a Trustee, to convey the Legal Estate to the Purchaser: Or, if the Vendor should not be able to procure such Conveyance, then that he will repay the Purchase Money, at the end of such Months, on having the Premises reconveyed; freed from all Incumbrances by the Purchaser, and from all manner of Waste, Spoil, and Damage: and that the Purchaser shall be permitted to receive the Rents, in lieu of Interest, till the Conveyance of the Legal Estate, or Repayment of the Purchase Money. 346 — To procure trustees' heir to convey legal estate, or to repay purchase money.

Bond from a Vendor to a Purchaser, for quiet Enjoyment of Freehold and Leasehold Property, or a Return of the Purchase Money in case of Eviction. 350 — For quiet enjoyment; or return of purchase money, if evicted.

Bond for quiet Enjoyment, where the Title commenced at too late a Period. - - 352 — For quiet enjoyment, where title was too recent.

For quiet enjoyment against all persons, except lessee for years. — Bond from a Vendor to a Purchaser, for peaceable Enjoyment of an Estate, against all Persons whomsoever; excepting Persons claiming under a Lease for Years. Page 354

For quiet enjoyment generally, further assurance, &c. — Bond from a Vendor to a Purchaser, for quiet Enjoyment against all Mankind; free from all Incumbrances; and for further Assurance generally. - 355

To repair a road. — Bond from a Purchaser under a Commercial Road Act, to the Trustees, to keep in Repair a Road from the Land purchased to communicate with the New Road. 358

Resignation of a benefice, before a bishop. — A Form of Resignation taken before a Bishop. 420

Resignation of a benefice, before a notary public. — Resignation of a Vicarage or Rectory (*mutatis mutandis*) before a Notary Public, when the Bishop is absent. 421

To resign on request. — Bond not to vacate a Rectory without the Patron's Consent, and to resign the Living on Request, and procure the Bishop to accept the Resignation: being a General Bond of Resignation.* - 434

To secure incumbency to incumbent for his life. — Bond from the Purchaser of an Advowson to secure the Incumbency to the Vendor, the present Incumbent, for his Life. - - - - 437

Not to carry on business. — Bond not to carry on Business within Half a Mile for a certain Number of Years, nor to solicit Custom of Persons mentioned in a Schedule, under the Pain of paying Liquidated Damages. - - 439

By principals and sureties to bankers for limited amount. — Bond from Two Principals and their Two Sureties, to Four Bankers, for securing Sums advanced and to be advanced for the Principals, by the Firm of the Banking House for the Time being, with Interest and Commission: and with a Proviso, limiting the

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* As to bonds of special resignation, see 360.

Amount of the Money to be recoverable under the Bond. - - - Page 446

Bond from a Tradesman and his Two Sureties to Bankers, to secure to the Firm of the Banking House for the time being, such Balance as may become due on Account Current, with the Principal, or with him and any Partner or Partners: with a Proviso, limiting the Amount of the Money to be recovered under the Bond; but the Bond to be a continuing Security to that Amount. - - - 460 — To bankers for limited current balance.

A Single Bond or Bill, where the total Amount of the Money secured, or to be ultimately recoverable thereupon, is uncertain, and without any Limit. - 467 — Single bond for unlimited sum.

See further as to Bond, titles Annuity, Arbitration, Indemnity, Mortgage, and Settlement; and Index to the Precedents, title Bond. — Particular bonds.

CONFIRMATION. 471

Release by way of Confirmation by an Heir at Law of an Estate mentioned to be devised by a Will unattested, and where the Words of the intended Devise extended only to the Life of the Devisee; the Heir claiming a conditional Benefit under the Will, and thinking that it was the Testator's Intention to give the Fee. 473 — Unattested will to devisee in fee.

Confirmation by an Heir at Law of a Will executed in the Presence of Two Witnesses only, by a Release in Fee, to the use of a Trustee for 500 Years; Remainder to the use of a Son, a Devisee in Tail: Remainder to the use of a Daughter, a Devisee in Fee; Declaration that the Premises shall be subject to the Payment of such of the Testator's Debts, &c. as they would have been liable to, in case his Will had been duly executed: and that the Term of 500 Years was limited — Unattested will to trustee for a term to pay debts; remainder in tail, &c.

to the Trustee to raise Debts, &c. and subject thereto, to attend the Uses limited. - Page 476

Release in fee, and for lives; and covenant to surrender copyholds.

Confirmation of a Will by an Heir at Law, to prevent the necessity of proving it in Chancery; being a Release in Fee, and of Leasehold, for Lives; with a Covenant to surrender Copyholds to the Trustees of the Will, to be held to and for the Uses, and upon the Trusts declared by the Will, and to be subject to the Sums of Money thereby charged on the Lands. - 479

In fee to devisee.

Confirmation of a Devise by the Testator's Heir at Law. 485

Confirmation, release in fee, and assignment on trusts for sale.

Confirmation by the Heir at Law of a Devisee in Fee: Release in Fee by the Heir at Law and the other Children of the Testator, all beneficially interested under the Will; and Assignment by all of them of Leaseholds, upon Trust to sell the Lands when the Youngest Child comes of Age, at which Times he is to execute the Deed: with a partial Power of Preemption to the Heir at Law, and Admission by the other Children that some Lands interlined in the Will did not pass thereby; but descended to the Heir at Law. 492

Attestation of execution by a person who afterwards became of age.

Attestation of the Infant's Execution after she became of Age. - - - - 529

By heir, of devise by equitable tenant in tail of copyholds.

Confirmation of a Devise of a Copyhold to a Younger Son, where the Testatrix being Equitable Tenant in Tail, with the Equitable Remainder in Fee, only the Equitable Remainder in Fee passed by her Will, but the Heir being desirous to establish the Devise intended to have been made,—For that purpose, the Heir and the Devisee, on the Day of the Date of this Indenture, have surrendered to the Use of Trustees in Fee the devised Premises; with a Memorandum, that the Surrender was made to the Trustees, upon such Trusts, &c. as the Devisee should by his Will appoint;

and in default of Appointment, in Trust for the Devisee in Fee. Testatum, Covenant for the Heir for further Assurance; and for Peaceable Enjoyment: and Covenant by the Devisee with the Heir, for Peaceable Enjoyment of Copyholds devised to him. Page 530

Confirmation by the Testator's next of Kin of Payments made to the Legatees under his Will, whereby he gave his Residuary Personal Estate to such of his Nephews and Nieces as should be living when the Youngest came of Age; and Consent to the Payment of the Residue when the Youngest Child shall come of Age. - - - - - - 539 — By next of kin of payments before legacies vested.

Confirmation of the Title of a Purchaser of a Copyhold Estate, where the Title was derived under a Surrender by a Married Woman alone, without her Husband, to the Use of herself for Life; Remainder to her Husband in Fee, with an intended Shifting Use in Fee, which failed of Effect; the Confirmation being by a Release by the Heir of the Wife to the Purchaser in Fee, according to the Custom of the Manor. - - - - - - 542 — By heir of copyholds surrendered by a woman without her husband.

Confirmation of a Lease by One of Three Trustees, where a Testator gave Leasehold Lands to Three Trustees, upon Trust to Underlease so much as he should not have Leased, Two only of whom having been Parties to a Lease, and doubts having arisen, whether Two of the Trustees were alone competent to make the Lease; therefore the other consented to confirm; and which is accordingly done by Indorsement on the Lease. - - - - - - 545 — By one of three trustees, where two only had been parties to a lease.

Confirmation of a Lease by the Lessor, who had not the Legal Estate when he executed the Lease, but who subsequently acquired it. - - - 548 — Of lease by lessor, who subsequently acquired legal estate.

Confirmation by way of Covenant by Three Vendors severally, to levy a Fine *sur conuzance de droit*, at the — Covenant to levy fine, where land had been

described in wrong parish. Purchaser's Expense, to Uses to prevent Dower, of a Close described in the Lease and Release, to be in a wrong Parish: Covenant by the Three Vendors severally, separate from the others, and only as to the Acts of himself, his Heirs, &c. that the Covenantors respectively, and their respective Heirs, &c. will perform the Covenants in the Release, concerning the Close therein described, in the same manner as if the same Covenants had been concerning the Close herein comprised; so that the said Covenants may have the same Effect as to the Close herein comprised, as if the same Close had been the Close described in the Release. - - - - - 550

Of deeds destroyed by fire. Confirmation of Mortgage Deeds destroyed by Fire. 556

PRECEDENTS

IN

CONVEYANCING.

AWARD.

BY ONE ARBITRATOR, ON GENERAL REFERENCE, OF PAYMENT, AND RELEASES.

AWARD (*a*) *of one Arbitrator, under cross Bonds of Submission on a general Reference, That a* SUM OF MONEY *shall be paid by one of the Parties to the other; and that each of the Parties shall give to the other a* GENERAL RELEASE.

Recital of differences be-

TO ALL TO WHOM THESE PRESENTS SHALL COME, I [*arbitrator*] of, &c. *send Greeting*. WHEREAS divers

(*a*) Where the payment of money alone is awarded, the proper mode of enforcing performance is an application to a court of law; *Hall* v. *Hardy*, 3 P. Wms. 190; except the award were made pursuant to a reference by order of a court of equity; in which case, that court would undoubtedly decree performance, though the award were only to pay money. Caldw. Abr. 167. [178, 2d ed.] But wherever any thing is directed by the arbitrators to be done *in specie*, as to convey an estate, or the like, there, a bill in equity for a specific performance will lie, if the plaintiff has paid, and the defendant accepted part of the money awarded as the consideration for the conveyance; *Hall* v. *Hardy*, 3 P. Wms. 189; or if either party has performed his part of the award; *Bishop* v. *Bishop*, 2 Ch. Rep. 142; *Bishop* v. *Webster*, 1 Eq. Cas. Abr. 51, pl. 9; or if there has been any subsequent agreement by the parties to have the award executed; *Thompson* v. *Noel*, 1 Atk. 62; even although the award was not made originally by the direction of the court. *Bishop* v. *Bishop*, 1 Ch. Rep. 142. Vide *Wood* v. *Griffith*, 1 Wils. Ch. Rep. 34. 1 Swans. 52, S. C. *Et vide post*, 5, (*a*); 63, (*c*). [And the same rule obtains, although the award is not made a rule of Court, if it is made by virtue of an order of the Court. *Marquis of Ormond* v. *Kynnersley*, 2 Sim. & Stu. 15. *Ed.*]

Equity will in some cases decree the specific performance of an award.

BY ONE ARBITRATOR, ON GENERAL REFERENCE, OF PAYMENT, AND RELEASES.

tween two parties, and submission to the award of one arbitrator, by cross bonds;

differences and disputes having arisen, and been depending between [A. B.] of, &c., and [C. D.] of, &c., they the said [A. B.] and [C. D.] in order to put a final end to the said differences and disputes, did agree to refer the same to the award, order, and determination of me the said [*arbitrator*]; and did accordingly by their several obligations, bearing date on or about the day of instant (*or* last), respectively become bound each to the other, in the penal sum of pounds, of good and lawful money of Great Britain [and Ireland]; *With conditions* thereunder written, to stand to, obey, abide, observe, perform, fulfil, and keep the award, order, arbitrament, final end, and determination of me the said [*arbitrator*], an arbitrator indifferently elected and named, as well on the part and behalf of the said [A. B.], as of the said [C. D.], to arbitrate, award, order, judge, and determine of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, both in law and equity, at any time theretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties, or either of them; *So as* the said award of me the said arbitrator, should be made in writing, and ready to be delivered (*b*)

with conditions for a general reference,

so as the award should be made on or before a given time.

When the award is made, the law implies it is then ready to be delivered.

(*b*) An award, which is required to be made in writing, &c. and *ready to be delivered* at such a time, is complete, if made in writing, and *ready to be delivered* by the arbitrator within the time, though not actually delivered. *Brown* v. *Vawser*, 4 East, 584. So where, by the terms of reference, attestation and delivery are not necessary to perfect an award, if it be once complete by the signature of an umpire or arbitrator, it is then ready for delivery, though not attested or delivered. *Henfree* v. *Bromley*, 6 East, 310. For the law implies that it is then ready to be delivered; and therefore, on the issue *nul tiel agard*, it is not necessary for the plaintiff to aver in his replication that the award was ready to be delivered, but only to state that the arbitrators *made* their award on or before the time limited, and to set forth the award. *Joyce* v. *Haines*, Hard. 399. 3 Vin. Abr. 117, pl. 22. *Vide ante*, Vol. II. 583, (*b*). However it is now usual in the replication also to state,

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to the said parties in difference, or such of them as should require the same, on or before the day of then next; as by the said obligations and conditions more fully appear. Now know ye that I the said [*arbitrator*], the arbitrator aforesaid, having taken upon me the charge of the said award and arbitrament; and having been attended by the said parties and their respective attornies; and having heard, examined, and considered the allegations and evidence of both the said parties and their witnesses (*c*), concerning the premises, *do* thereupon make this my award in writing concerning the same, in manner and form following, that is to say; I do award, (*d*) arbitrate, and determine that the said [C. D.], his executors or administrators, shall and do well and truly pay, or cause to be paid to the said [A. B.], his executors or administrators, on the day of next ensuing, between the hours of and of the clock of the same day, at the house of in in the said county of , the sum of pounds of lawful money of Great Britain [and Ireland]. And I do further award, arbitrate, and determine, that upon payment

Testatum.

award that one party shall pay to the other a sum of money;

and that each of the parties shall give to the other a general release.

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in the words of the submission, that the award was "ready to be delivered to the said parties in difference, or such of them as should require the same." *Vide* Caldwell on Arbitration, 36. 2 Chitty on Pleading, 645, 3d ed. [See Cald. 216, 2d ed.]

(*c*) All the witnesses of the party, against whom an award is made, should regularly be examined, and in the presence of him and of his attorney, if he require it, or it will be a ground for setting aside the award; but the fact must be clearly proved by affidavits: however, a formal requisition that a witness shall be examined, is not requisite; merely naming and producing him to the arbitrator is sufficient. *Beddington* v. *Southall*, 4 Price, 235, 236. And if, upon a reference by rule of court, either party is precluded by the terms of the rule from going into evidence of that which he is desirous to try, his remedy is by moving to set aside the rule of reference, upon affidavits, shewing that it was drawn up by mistake: but he cannot impeach the award. *Doe*, lessee of Lord *Carlisle*, v. Bailiff, &c. of *Morpeth*, 3 Taunt. 378. [*Doddington* v. *Hudson*, 1 Bing. 384. See Vol. II. 592, *& post*, 118.]

The witnesses should be examined in the presence of the party, if he require it.

(*d*) [There are no particular words necessary in making an award; the term "I am of opinion," is sufficient. *Matson* v. *Trower*, 1 Ry. and Moo. 17. *Ed.*]

BY ONE ARBITRATOR, ON GENERAL REFERENCE, OF PAYMENT, AND RELEASES.

of the said sum of pounds to the said [A. B.], as aforesaid, they the said [A. B.] and [C. D.] shall and do respectively, at the costs and charges of the party requiring the same, sign, seal, and as their respective acts and deeds deliver, each unto the other of them, mutual general releases in writing of all and all manner of action and actions, cause and causes of action, bills, bonds, covenants, debts, rent, specialties, controversies, claims, and demands whatsoever, from the beginning of the world until the day of the date of the aforesaid obligations. IN WITNESS whereof I the said [*arbitrator*], the arbitrator aforesaid, have hereunto set my hand, the day of , 18 .

SIGNED AND PUBLISHED (being first duly stamped (*d*)), in the presence of us (*e*),

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Stamp.

(*d*) By the 55 Geo. III. c. 184, the stamp duty on an AWARD is *one pound fifteen shillings:* and where the same, together with any schedule or other matter put or indorsed thereon, or annexed thereto, shall contain 2,160 words or upwards; then for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words, a further *progressive* duty of *one pound five shillings.*

The same stamp is requisite, whether the award be under hand, or under hand and seal, and whether it be or be not delivered as a deed.

It was not formerly necessary that an award in writing, though under seal, should have a deed stamp, unless it was delivered *as a deed;* for if it was only delivered *as an award,* it was sufficient if it had the award stamp of ten shillings. *Brown* v. *Vawser,* 4 East, 584. Tidd's Prac. 860, 7th ed. *Wilson* v. *Smee,* Addendum, Kyd on Awards, VII. 2d ed. *Blundell* v. *Brettargh,* 17 Ves. 241, *Et vide ante,* Vol. II. 588, (*d*). But this distinction is rendered immaterial by the above act, as it requires the same stamps for awards as for deeds, not affected by the *ad valorem* duty, and therefore the same stamp is requisite, whether the award be under hand only, or under hand and seal; and whether it be or be not delivered as a deed.

Where there is a community of interest, one stamp is sufficient.

Where several underwriters on a policy enter into an agreement to refer the demand of the assured to arbitration, one stamp for the agreement to refer, and one stamp for the award, are sufficient, there being

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It seems prudent to have two witnesses to an award.

(*e*) It seems generally prudent to have two witnesses to an award or umpirage, in order to prevent the trouble which would be caused in case a single witness should die, and it should afterwards be requisite to have an affidavit of the due execution, in order to ground a motion for an attachment.

a community of interest between the parties in the subject matter. *Goodson* v. *Forbes*, 6 Taunt. 171; 1 Marsh. 525, S. C.

If an award be made on an improper stamp, and no application be made to enforce the award, the Court will not set it aside; because the award may be rendered a valid instrument, by procuring the proper stamp and paying the penalty, before the plaintiff moves for an attachment for nonperformance of the award, or takes any other step to enforce it. *Preston* v. *Eastwood*, 7 Durnf. and East, 95. And if an objection to the stamp be not alleged as a ground for obtaining a rule to shew cause to set aside an award, the Court will not suffer it to be relied on afterwards, when cause is shewn. *Liddell* v. *Johnstone*, H. 38 Geo. III. K. B. 2 Tidd's Prac. 874, 7th ed.

An objection for want of a proper stamp cannot be supported, if no application be made to enforce the award; and if it be not alleged as a ground for obtaining a rule, it cannot be made when cause is shewn.

BY TWO ARBITRATORS OF DIFFERENT SUMS, VACATION AND CONFIRMATION OF CONTRACTS.

AWARD (*a*) *of Two Arbitrators under Cross Bonds from A. B., to C. D. and E. F., and from C. D. and E. F. to A. B., on a* GENERAL REFERENCE, *where the Submission had been made a Rule of Court, and the* TIME *for making the Award had been* ENLARGED BY *several Orders of* THE COURT, *That C. D. owes A. B.* 3516*l.* 8*s.* 1*d.*; *of which E. F. is liable for* 226*l.* 12*s.* 6*d.*; *E. F. to pay the* 226*l.* 12*s.* 6*d. to A. B. on the* 10*th of June next, at Peele's Coffee House: and*

(*a*) The mode of enforcing an award by the party in whose favour it is made, is by *action:* or when the submission is made a rule of court, by *attachment*. *Forster* v. *Brunetti*, 1 Salk. 83. And if a *verdict* has been taken for the plaintiff's security, by entering up *judgment* thereon, and taking out *execution*. 2 Tidd's Prac. 865, 7th ed. *Vide ante*, 1. (*a*) [Assumpsit for not standing and abiding by an award is maintainable, *Brown* v. *Tanner*, 1 Carrington and Payne, N. P. C. 655, 1 M'Clell. and Yo. 464, S. C. *Ed.*]

The mode of enforcing an award.

Upon an affidavit that the original award was lost, by the mail being robbed in coming to town, the Court granted a rule for an attachment *nisi* on a copy of it. *Robinson* v. *Davis*, 1 Stra. 526. So if an award be lost, the court will, nevertheless, permit judgment to be entered accordingly, upon an affidavit of its contents. *Hill* v. *Townsend*, 3 Taunt. 45. In which case the original draft of the award was annexed to the affidavit.

If the award is lost, there must be an affidavit of its contents.

BY TWO ARBITRATORS OF DIFFERENT SUMS, VACATION AND CONFIRMATION OF CONTRACTS.

3289l. 15s. 7d., the Residue, to be paid by C. D. by Instalments; and for securing the Payment thereof, C. D. within one Week to execute a Warrant of Attorney to confess Judgment to A. B. for the 3,289*l.* 15*s.* 7*d.*, *with Stay of Execution by a Defeazance, until the Instalments shall become payable; in case C. D. should neglect to execute Warrant of Attorney, that A. B. may proceed for Recovery of the whole* 3,289*l.* 15*s.* 7*d.*: *that a Contract for a Mare and Colt be rescinded: that the Mare and Colt are the Property of A. B.; that a Bond given on account of the Purchase of the Mare and Colt be cancelled, or if lost, a Release given: that an Annuity granted by C. D. to A. B. shall stand confirmed: that on Payment of the* 226*l.* 12*s.* 6*d.* *A. B. shall give E. F. a general Release: and that the Costs of the Reference and Award shall be borne by A. B. and C. D. equally.*

Exordium.

TO ALL TO WHOM THESE PRESENTS SHALL COME, *We* [*W. Adam*], of Lincoln's Inn, in the county of Middlesex, esquire, and [*I. 'Espinasse*], of Gray's Inn, in the said county, esquire, *send Greeting*.

Recital of cross bonds from one to two, and from two to one;

WHEREAS by two several bonds or obligations, bearing date respectively the (fourteenth) day of (March) last; *one* of them under the hand and seal of [A. B.], of, &c., esquire; *and* the other of them under the hands and seals of the Right Honourable [C. D.], Earl of [K.], in the kingdom of Ireland, and [E. F.], of, &c. esquire; *Whereby* the said [A. B.], in one of such bonds or obligations, became bound to the said [C. D.], Earl of [K.], and the said [E. F.]; *And* in the other of such bonds or obligations, the said [C. D.], Earl of [K.], and the said [E. F.] became bound to the said [A. B.] in the penal sum of (10,000*l.*); *With conditions* thereunder respectively written, for making void the same in case the said parties respectively, their heirs, executors, and administrators, should in all things well and truly stand to, obey, perform, fulfil, and keep the award, order, arbitrament, final end and determination of us the said [*W. Adam*] and [*I.*

with conditions for a general reference to two arbitrators;

'*Espinasse*], arbitrators indifferently named, elected, and chosen, as well on the part and behalf of the said [A. B.], as of the said [C. D.], Earl of [K.], and [E. F,], to arbitrate, award, order, judge, and determine of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time or times heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties, and each of them; *So as* we the said arbitrators did make and publish our award in writing, on or before the (fourteenth) day of (April) now last past: AND the said parties did thereby also consent and agree, that the submission thereby made to the award, or to the umpirage therein mentioned, should be made a rule of his Majesty's court of King's Bench at Westminster, which was afterwards accordingly done. AND WHEREAS, by a certain memorandum in writing, under the hand of the said [A. B.], indorsed or written in the margin of one or both of the said bonds or obligations, at the time of the execution thereof, *it was agreed* between the parties, that the said [E. F.] should not be accountable for the payment of any sum of money, which should happen to be awarded against the said [C. D.], or against the said [E. F.], beyond or further than the sum of (230*l.*) being the supposed amount of two bills of exchange, accepted by the said [C. D.], and which were then in the hands of (*James* and *Henry Johnson* of *Pall-Mall*,) and for which the said [E. F.] thereby agreed to be answerable. AND WHEREAS, by several rules or orders of the said Court of King's Bench, the time for us the said arbitrators, for making our award, hath been enlarged (*b*) till the (ninth) day of (May) instant, the day of the date hereof; as by the said bonds and rules of court, reference being thereunto respectively had, will more fully and at large appear. NOW THESE PRESENTS WITNESS, that we, the said [*W. Adam*] and [*I. 'Espinasse*], the arbitrators named and appointed in and by the said bonds respectively, having taken upon ourselves the burthen of

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so as the award should be made on or before a given day.

Recital of agreement, that award or umpirage should be made a rule of court; which was afterwards done.

Recital of indorsement that one of the two obligors should not be accountable beyond a certain sum.

Recital that by several rules of court, the time for making the award had been enlarged.

Testatum.

(*b*) *Vide ante*, Vol. II. 631, (*a*), *ad finem*.

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the said arbitration, and having fully heard, and maturely considered all the evidence produced on behalf of each of the said parties in difference, and having carefully investigated and examined all the accounts and vouchers produced before us touching the matters in difference, and to us referred, in manner aforesaid, *Do* hereby make and publish this our award in writing, in manner following; that is to say; *First*, we do find and award, that there is justly due and owing from the said [C. D.], Earl of [K.], to the said [A. B.] the sum of (3516*l.* 8*s.* 1*d.*); of which said sum, we find that the said [E. F.] has become, or made himself liable for the payment of (226*l.* 12*s.* 6*d.*), part of the said sum of (3516*l.* 8*s.* 1*d.*), which we find to be a just and fair debt: *We therefore* order and award the said [E. F.] to pay the said sum of (226*l.* 12*s.* 6*d.*) to the said [A. B.], or to his attorney lawfully authorised to receive the same, on the (tenth) day of (June), next ensuing the date of this our award, at Peele's Coffee-house, Fleet Street, in the city of London, between the hours of ten and twelve of the clock in the forenoon of that day: *And* as to the sum of (3289*l.* 15*s.* 7*d.*), being the residue and remainder of the said sum of (3516*l.* 8*s.* 1*d.*), (after deducting the said sum of (226*l.* 12*s.* 6*d.*), so awarded to be paid by the said [E. F.], as aforesaid,) *We* order and award the same to be paid by the said [C. D.], Earl of [K], to the said [A. B.], or to whom he shall duly authorise to receive the same, at the time and in manner following; that is to say: (*specify the times and proportions.*) AND for the better securing the payment of the said sum of (3289*l.* 15*s.* 7*d.*), so by us awarded to be due from the said [C. D.], Earl of [K.], and to be paid by him, at the time and times, and in manner aforesaid, to him the said [A. B.], *We* do hereby award, order, and direct, that within one week from the day of the date of this our award, or so soon after as the same shall be demanded, the said Earl of [K.] shall duly seal and execute unto him the said [A. B.], a warrant of attorney, to confess a judgment against him the said Earl of [K.], in his Majesty's Court of King's Bench at Westminster, as of this present Easter Term, for the said sum of (3289*l.* 15*s.* 7*d.*), so by us awarded as aforesaid, to be paid by the said Earl of [K.] to the said [A. B.];

Award,

that C. D. owes A. B. 3516*l.* 8*s.* 1*d.*; of which E. F. is liable for 226*l.* 12*s.* 6*d.*

E. F. to pay the 226*l.* 12*s.* 6*d.* to A. B. on 10th June next, at Peele's Coffee-house;

and 3289*l.* 15*s.* 7*d.* the residue, to be paid by C. D. by instalments;

and for securing the payment thereof,

C. D. within one week, to execute a warrant of attorney to confess judgment to A. B. for the 3289*l.* 15*s.* 7*d.*,

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but with stay of execution, as to all the respective sums of (1050*l.*, 1050*l.*, and 1189*l.* 15*s.* 7*d.*), (by a defeazance, to be indorsed on such warrant of attorney,) until the same shall have become payable respectively, at the several time and times hereinbefore limited and appointed for the payment thereof in and by this our award, according to the true meaning hereof. And in case the said Earl of [K.] should refuse, or neglect to execute the said warrant of attorney as aforesaid, *We* then order and award that it shall and may be lawful to and for the said [A. B.], after such refusal, to become entitled to, and to demand the whole of the said sum of (3289*l.* 15*s.* 7*d.*) from the said Earl of [K.], and to proceed by attachment, or otherwise, for the recovery thereof; and be entitled to recover the same (after such refusal as aforesaid) in such manner as if we had in the first instance ordered the same to be paid all at once, and not by instalments, as before mentioned, according to the true meaning hereof. And we do hereby further award and declare, that the contract for a certain mare and colt, now in Ireland, supposed to have been sold by the said [A. B.] to the said Earl of [K.], be rescinded; and that such mare and colt are now the property of the said [A. B.], and not of the said Earl of [K.]. And we do order and direct, that a certain bond and obligation for the sum of (630*l.*), given by the said Earl of [K.] to the said [A. B.], on account of the said mare and colt, be delivered up by the said [A. B.] to the said Earl of [K.], to be cancelled; or a proper release be given for the same, in case such bond or obligation should appear to have been lost or mislaid. And we do further hereby award and declare, that a certain annuity, granted by the said Earl of [K.] to the said [A. B.], for securing to him the said [A. B.] the sum of (100*l.*) per annum, during the life of the said Earl of [K.], shall stand established, and be confirmed; and the said [A. B.] be entitled regularly to receive the same, according to the tenor thereof, from the said Earl of [K.]. And we do further award and direct, that on payment of the before mentioned sum of (226*l.* 12*s.* 6*d.*) on the (tenth) day of (June) next, by the said [E.F.] to the said [A. B.], the said [A. B.] shall give to the said [E. F.] a proper release and discharge for the same. And we do hereby further order, award, and direct, that the

with stay of execution by a defeazance, until the instalments shall become payable:

in case C. D. should neglect to execute warrant of attorney;

that A. B. may proceed for recovery of the whole 3289*l.* 15*s.* 7*d.*

that a contract for a mare and colt be rescinded;

that the mare and colt are the property of A. B.;

that a bond given on account of the purchase of the mare and colt be cancelled; or if lost, a release given:

that an annuity granted by C.D. to A. B. shall stand confirmed;

that on payment of the 226*l.* 12*s.* 6*d.* A. B. shall give E. F. a release:

and that the costs of reference and award

shall be borne by A. B. and C. D. equally.

costs and charges (*c*) of this reference, and the charges of making this our award, shall be paid and borne by the said

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(*c*) *Quære.* Whether an award upon the reference of an action, directing the payment of costs of the award, without fixing the amount thereof, is bad in that point for uncertainty; or whether the amount may not be taxed by the officer of the court? *Barrett* v. *Parry*, 4 Taunt. 658. And see *Fitzgerald* v. *Graves*, 5 Taunt. 342.

Power of arbitrators as to costs.

When a cause is depending, the submission is either silent with respect to *costs*, or they are directed to abide the event of the award, or else to be in the discretion of the arbitrator. The power of awarding costs is necessarily consequent to the authority conferred upon the arbitrator of determining the cause; and the reason why, in references by rule of court, a provision is frequently inserted, that the costs shall abide the event of the award, is that the arbitrator may not have it in his power to withhold costs from the party who is in the right; but that is to be considered as the restriction of a power, which he would otherwise necessarily have, of allowing costs at his election. *Roe* ex dem. *Wood* v. *Doe*, 2 Durnf. and East, 644. *Hartnell* v. *Hill*, Forrest. 77. [Where there is a reference of all *incident* costs, the costs, as well of *subsequent* as of previous proceedings, may be included in the award. *Baker* v. *Townshend*, 7 Taunt. 422. 1 J. B. Moo. 120. S. C.] In *Whitehead* v. *Frith*, 12 East, 165, the Court of King's Bench held, that upon a submission by bond of all matters in difference between the parties in a cause, the arbitrator has no authority to award costs, as between attorney and client, but only as between party and party. But in *Hartnell* v. *Hill*, Forrest. 73, the Court of Exchequer held, that where the submission to an award is by bond merely, the arbitrators may award costs between attorney and client; and though the arbitrators award the costs of the reference, which are not within the terms of the submission, that will not vitiate the award itself, but it will be good as to the remainder. *Post*, 14. For arbitrators cannot award the costs of *reference*, unless power be expressly given to them for that purpose. *Candler*, or *Chandler* v. *Fuller*, Willes, 62. Kyd on Awards, 394, 2d ed. S. C. So, where all matters in difference are referred to arbitration, except the costs of the *action*, and no notice is taken of the costs of *reference*, the latter are not in the discretion of the arbitrator. *Strutt* v. *Rogers*, 2 Marsh. 524. 7 Taunt. 213. S. C. Nor will an award, that one party shall pay to the other the costs by him sustained in the action, include the costs of reference. *Browne* v. *Marsden*, 1 H. Bla. 223. [*Frith* v. *Robinson*, 1 B. & C. 277.] If no directions be given respecting the costs of an award, they are to be paid by both parties equally. *Grove* v. *Cox*, 1 Taunt. 165.

[A. B.] and the said Earl of [K.], in equal moieties. In witness whereof, we the said arbitrators have hereunto set our hands and seals, the (ninth) day of (May), 18 .

BY TWO ARBITRATORS OF DIFFERENT SUMS, VACATION AND CONFIRMATION OF CONTRACTS.

Testimonium.

Witnesses,

An arbitrator cannot, it seems, without authority, charge a certain sum for his own expenses. *George* v. *Lousley*, 8 East, 13. For it has been held, that the law raises no *implied* promise to pay an arbitrator for his trouble. *Virany* v. *Warne*, 4 Esp. N. P. C. 47. [*Bell* v. *Bilson*, 3 Chit. 157.] But see [*Swinford* v. *Burn*], 1 Gow. 7, 8, and the cases there cited, by which it seems that an arbitrator may recover a compensation for his trouble. If arbitrators award an excessive sum to be paid to themselves, the Court of Common Pleas will refer it to the prothonotary to reduce it. *Miller* v. *Robe*, 3 Taunt. 461. *Fitzgerald* v. *Graves*, 5 Taunt. 342. See further as to costs, 2 Tidd's Prac. 862, 7th ed. Caldwell on Arbitration, 70, 469. [And see *post*, 106, *et seq.* 113, and 133.]

Qu. whether an arbitrator can, without authority, charge for his own expenses.

[If an arbitrator exceeds his authority, the award will be bad. *Bonner* v. *Liddell*, 1 Brod. and Bing. 80. But upon an agreement between surgeons resident at H., to dissolve a partnership, and that one should carry on the business, on terms to be settled by an arbitrator; an award which directed that the other should not carry on the business of a surgeon at H., or within thirteen miles of it, was held not to be an excess of authority. *Morley* v. *Newman*, 5 Dow. and Ry. 317. And see *Jackson* v. *Clarke*, 1 M'Clell. and Yo. 200. *Ed.*]

Authority of arbitrator.

RESPECTING MESNE PROFITS, &C. AFTER RECOVERY IN EJECTMENT.

AWARD (*a*) *by one Arbitrator, under cross Bonds of Submission, after a Verdict in Ejectment for the Plaintiff, respecting his Demand of mesne Profits, and the Value of a Wind-*

An award should be certain and final.

(*a*) The general requisites of an award are, that it be certain and final. 1 Roll. Abr. 263. 1 Bac. Abr. Gwill. ed. 218. *Arbitrament*, (E.), 2. For as an award is in the nature of a judgment, it ought to be wholly decisive; for if it does not determine the matter, it becomes the cause of a new controversy: therefore, if the arbitrators award a bond for quiet enjoyment of lands, without appointing a certain sum, this is a void award, and the party is not obliged to give a bond to the value of the land; for then the sense of the award must be supplied by averment: now if it has the credit of a judgment, there can be no interpretation made of the award, but by the words of the award itself; for if it receives its meaning from any matters out of the award, the mind of the arbitrators is only guessed at, and not expressed: but the parties intended to be obliged only by what the arbitrators themselves declare to be their award; and were the bond to be according to the value, they cannot assign their power to any person to assess the value. *Samon's* case, 5 Co. 78, S. C. *Samon* v. *Pitt*, Cro. Eliz. 432. Dyer, 242. a. (51). *Martham* v. *Jemx*, Yelv. 97.

Instances of awards being void for uncertainty.

Thus if the arbitrators award that one party shall give security to the other for the payment of 16*l.*, this is not a good award, because it does not appear what security, whether by bond or otherwise. *Thinne* v. *Rigby*, Cro. Jac. 314, S. C. Jenk. 348. *Tipping* v. *Smith*, 2 Str. 1024, S. P. So an award "that the defendant shall deliver certain goods particularly named, and three boxes, and *several* books," without naming the books, is uncertain: the books should have been particularly described, unless it had been said that the books were within the boxes, by which they would have been sufficiently ascertained. *Cockson* v. *Ogle*, 1 Lutw. 550. So an award, "that one of the parties shall deliver up to the other a certain writing obligatory, or a certain bill obligatory which he had before," is altogether uncertain, for it does

Mill removed after the Verdict and before the Possession was delivered by the Sheriff, where

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not say of what sum, or of what penalty the bond is, or of whom it was obtained. *Bedam* v. *Clerkson*, 1 Ld. Raym. 123.

So an award that the defendant shall pay to the plaintiff such a sum of money, unless within twenty-one days (which in fact was after the time limited for making the award) the defendant shall exonerate himself by affidavit from certain payments and receipts, in which case he was only to pay a certain other less sum, is illegal and void, being uncertain and inconclusive. *Pedley* v. *Goddard*, 7 Durnf. and East. 73. [If the terms of an award be not clear, it seems that the arbitrators may explain its meaning by affidavit, *Gordon* v. *Mitchell*, 3 J. B. Moore, 251. *Ed.*]

But certainty to a common intent is sufficient.

But the certainty of an award may be judged of according to a common intent, and consistent with fair and reasonable presumption: therefore where the submission was in general terms, "of *all* actions, controversies, and suits between the parties," and the arbitrator recited *one* which was in fact depending, referring to the submission as authorising him to determine it, the award was holden sufficiently certain, for there was no probable presumption of any other cause of complaint, the parties not having desired to be heard upon any more than that one. *Hawkins* v. *Colclough*, 1 Burr. 277. And an award that two persons shall pay a debt in proportion to the shares which they held in a certain ship, the *ratio* of their shares not being a subject of dispute, is sufficiently certain. *Wohlenberg* v. *Lageman*, 6 Taunt. 254; 1 Marsh. 579, S. C. [And as far as the terms will admit, a conclusive meaning will be given to it, nor will one part be allowed to defeat another. *Wood* v. *Griffith*, 1 Swanst. 53. And see *Doe* dem. *Williams* v. *Richardson*, 8 Taunt. 697; *Cargie* v. *Atcheson*, 2 B. and C. 170; *Lawrence* v. *Hodgson*, 1 Yo. & Jer. 16; *Hopcraft* v. *Hickman*, 2 Sim. & Stu. 130. *Ed.*]

What awards are sufficiently final.

An award which settles the costs on both sides is final; *Hartnell* v. *Hill*, Forrest. 73; So is also an award that certain actions be *discontinued*, and each party pay his own costs; this being in effect an award of a *stet processus*. *Blanchard* v. *Lilly*, *Rex Blanchard*, 9 East, 497. And an arbitrator, to whom all actions and causes of action, and all matters in difference in two actions between the parties, have been referred, is not compelled to take matters of an equitable nature into consideration; but an award made by him in reference to the two actions only is final. *Craven* v. *Craven*, 7 Taunt. 644. 1 Moore, 403, S. C. But notwithstanding the award be final as to all matters referred and decided upon by the arbitrators, yet upon a reference of all matters in difference between the parties, an award does not preclude the plaintiff from suing for a cause of action existing against the defendant at the time of the reference, upon proof that the subject

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the Arbitrator had, in pursuance of the Submission, enlarged the Time for making his

matter of such action was not laid before the arbitrators, nor included in the matters referred. *Ravee* v. *Farmer*, 4 Durnf. and East, 146. *Martin* v. *Thornton*, 4 Esp. N. P. C. 180. But it is otherwise if it was plainly within the terms and scope of the reference. *Smith* v. *Johnson*, 15 East, 213. Therefore upon a reference of all actions, controversies, &c., and also of two distinct matters of difference, if the arbitrator omit to decide one of such distinct matters, that vitiates the whole award, which cannot therefore be enforced by attachment. *Randall* v. *Randall*, 7 East, 80. So where the parties having submitted all matters in difference to arbitration, and the arbitrator determined all matters except one, and gave liberty to one of the parties to prosecute that matter if he chose, it was held that the award was bad *in toto*. *Bradford* v. *Bryan*, Willes, 268. 7 Mod. 349. S. C. *Gray* v. *Gwennap*, 1 Barnew. and Ald. 106, *post*, 18, (*e*). An award between a lessee and his neighbour, awarding an act to be done for the benefit of the latter by the lessee, which would be waste upon the estate of lessor, is bad. *Alder* v. *Savile*, 5 Taunt. 454. [And see *Jackson* v. *Yabsley*, 5 B. & A. 848. *Harris* v. *Curnow*, 2 Chit. C. Temp. Mansf. 594.]

What awards are not sufficiently final.

An award is void, if the performance of it would be a forfeiture of the party's estate.

An award however may be good in part, and bad in part, provided the latter be independent of and unconnected with the former. *Storke* v. *De Smeth*, Willes, 66. *Johnson* v. *Wilson*, Willes, 253. *Hartnell* v. *Hill*, Forrest. 73. *George* v. *Lousley*, 8 East, 13. 2 Tidd's Prac. 861, 7th ed. Thus, if amongst a variety of things appointed by an arbitrator to be done, there be one or two of which performance would be impossible, unlawful, or unreasonable; or extending to persons or to objects beyond the scope of the submission; in such case the mere existence of the direction in the award, though compliance with it be out of the question, does not of necessity nullify the whole. The general validity is alone impaired, when by the particular defect a mutuality of interest and advantage appearing evidently to have been intended by the arbitrator to be given, is destroyed; or where the general substance of the award, and the real justice of the case, are affected. Caldwell on Arbitration, 116. Thus, where it was awarded that one party should pay to the other a certain sum of money, and should also pay the costs of the arbitration; and then, that each party should give a release to the other; the court held, that since no specific authority as to the costs of reference had been vested in the arbitrators by the submission; and it being a matter arising subsequent to the time of the submission, that part of the award which concerned the costs of the reference was bad, but that the whole award was not on this account to be rejected. *Candler* v. *Fuller*, Willes, 64. S. P. *Fox* v. *Smith*, 2 Wils. 267. *Addison* v. *Gray*, 2 Wils. 293. *Bargrave* v. *Atkins*,

An award may be good in part, and bad in part, if the latter be independent of and unconnected with the former.

Award, and where no Witnesses were examined, That the Defendant shall pay to the Lessor of

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3 Lev. 413. *Pinkeny* v. *Bullock*, 2 Lev. 3. 2 Wms. Saund. 293, (1). [*Winter* v. *Lethbridge*, 1 M'Clell. & Yo. 253. *Hooper* v. *Hooper*, 1 M'Clell. & Yo. 509.] So where an award directed that a lease for life should be made to a party to the submission, with remainder to a stranger to the submission, in fee, the latter part was declared to be totally void; but that the rest of the award was not on that account the less valid. *Bretton* v. *Pratt*, Cro. Eliz. 758. So where an arbitrator awarded a sum of money to one party, and having stated in the award his reasons for conceiving so much to be due, it appeared that part of the supposed debt took its rise from an illegal transaction; the court ordered so much to be struck out of the sum awarded, but without prejudice to the rest of the award. *Aubert* v. *Maze*, 2 Bos. and Pull. 371. So where the submission being of *all matters* in difference between the parties, an award of so much to be paid by the defendant to the plaintiffs on their *banking account*, and for which sum the plaintiffs were to give the defendant a release, is binding between them; for no other matter in difference between them shall be intended, unless it be shewn; and the award is good for so much, though the arbitrators also awarded a sum to be paid by the plaintiffs to the defendant out of a partnership fund, in which others than the defendant were interested, who were no parties to the submission. *Ingram* v. *Milnes*, 8 East, 445. So if an award be made between A. of the one part, and B. of the other, by which it is awarded that A. should pay 10*l.* to B., and also that A. should pay 5*l.* to a stranger, and that B. should give A. a general release; here the award to pay 5*l.* to the stranger is void, and yet the award is good for the residue; for B. is not prejudiced though the 5*l.* be not paid to the stranger, for no more than 10*l.* was intended for him or his benefit. Arg. *Pope* v. *Brett*, 2 Saund. 293, S. P. *Samon* v. *Pitt*, 1 Roll. Abr. 259, pl. 8. Cro. Eliz. 432, S. C. [See 138, *post.*] But if the arbitrators award A. to pay B. 100*l.*, and award A. and B. to give general releases to each other, and then award B. to pay A. 20*l.* at a subsequent time, the whole award is bad. So if the arbitrators award A. to pay B. 30*l.* on the first of January, and B. to pay A. 10*l.* on the first of February, the whole is bad; such award being quite inconsistent with common sense. *Storke* v. *De Smeth*, Willes, 69. [And see *Winter* v. *Munton*, 2 J. B. Moo. 723.]

The part of an award to be performed by or to a stranger, is void.

An award that A. shall pay B. a sum, and B. pay A. a less sum at a subsequent day, is void.

But if by the nullity of the award in any part, one of the parties cannot have the advantage intended him as a recompence or consideration for that which he is to do to the other, the award is void in the whole.

If one of the parties cannot have the advantage intended

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the Plaintiff, £100 in full Discharge of the Matters referred.

Exordium.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*arbitrator*], of Lincoln's Inn, in the county of Middlesex, barrister at law, *send Greeting*. WHEREAS, [A. B.], of , in the county of Southampton, esq. by his bond, bearing date on or about the 22d day of March last past, became bound to [C. D.], of the same place, gentleman, in the penal sum of 2,000*l.*: *And* the said [C. D.], by his bond, also bearing date on or about the 22d day of March last past, became bound to the said [A. B.] in the penal sum of 2,000*l.*; *Which* said bonds respectively recite that an action of ejectment was tried at the summer assizes, 18 , at Winchester, in the said county of Southampton, wherein *John Doe*, on the several demises of the said [C. D.], and others, was the plaintiff, and the said [A. B.] was defendant; *And* that upon the trial of the said action, a verdict was given for the plaintiff and judgment entered up thereupon, and possession delivered to the said [C. D.] by the sheriff of the said county of Southampton, in execution of a writ of possession; *And* that the said [C. D.] had called upon the said [A. B.] for the payment of six years mesne profits of the lands and tenements recovered in the said action; and also for the value of the windmill, which was, as was alledged by the said [C. D.], taken down after the verdict was given, and before the possession was delivered by the sheriff as aforesaid; *And* that differences had arisen and were depending between the said [C. D.] and the said [A. B]. as to the said mesne profits and wind-mill; *And* that the said parties had agreed to refer the same to the award, judgment, and determination

Recital of cross bonds,

which recited an ejectment and a verdict for the plaintiff,

and that lessor of plaintiff had demanded mesne profits, and the value of a wind mill removed before execution of writ of possession;

and that differences had therefore arisen;

and that parties had agreed to refer same to arbitrator.

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him, as a recompence for what he is to do to the other, the award is void *in toto*.

1 Roll. Abr. 259, pl. 9, 10, S. P. See *Birks* v. *Trippet*, 1 Saund. 32. *Veale* v. *Warner*, 1 Saund. 324. *Hodsden* v. *Harridge*, 2 Saund. 61. *Coppin* v. *Hurnard*, 2 Saund. 127. Wms. n. 2 Saund. 293, (1). Therefore an award that A. shall be paid by B. money due for task work, and then A. should pay 25*l.* to B., and that the parties should give each other a general release, is void in the whole, for the uncertainty what sum should be paid for task work. *Pope* v. *Brett*, 2 Saund. 292.

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of me the said [*arbitrator*], an arbitrator indifferently chosen by and between the said parties, to award, arbitrate, and determine concerning the same: *Under* which said bonds, conditions were respectively written for making the same void, if the said [A. B.] and [C. D.] respectively, and their respective heirs, executors, and administrators, should well and truly stand to, observe, perform, fulfil, and keep the award, arbitration, judgment, final end, and determination which I the said [*arbitrator*] should make and give in and concerning the said matters in difference between the said parties; and all actions, suits, and causes of actions and suits, debts, dues, damages, claims and demands whatsoever, concerning the same; *So as* the award of me the said [*arbitrator*], should be made and set down in writing under my hand, ready to be delivered to the said parties in difference, or such of them as should require the same, on or before the first day of May then next ensuing; or on or before such further day, to which I, the said [*arbitrator*], should think proper to enlarge the time for making my award, not exceeding the first day of July then next; *As* by the said obligations and the conditions thereunder written, reference being thereto respectively had, will (among other things) more fully appear. AND WHEREAS before the said first day of May, I the said [*arbitrator*], did, in pursuance of the said power, enlarge the time for making this my award until the 30th day of this present month of June (*b*). NOW KNOW YE, *That* I the said [*arbitrator*], having taken upon myself the burthen of the said reference, and having heard and duly

Conditions of bonds, to abide by award, concerning the matters in difference;

so as the award should be made by a given day,

or on or before an enlarged limited time.

Recital of arbitrator having enlarged the time for making his award.

Testatum.

(*b*) Where the arbitrators have power to enlarge the time for making their award, and have enlarged it, and made their award in the additional time; in order to bring the defendant into contempt for non-performance of the award, there must be an affidavit that the time has been enlarged, that the award was made within the enlarged time, and that the defendant has been previously served with notice of those facts. And it seems that the affidavit for an attachment for non-performance of an award, must, contrary to the usual practice, always state the time of the execution of the award. *Wholenberg* v. *Lageman*, 6 Taunt. 251. 1 Marsh. 579, S. C. [*Halden* v. *Glasscock*, 5 B. & C. 390.] As to enlargement, *vide ante*, Vol. II. 619, 631. [and *post*, 125].

To bring a party into contempt for non-performance of an award made during an enlargement, the affidavit must state the time of the execution, &c.

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considered the allegations of the said parties respectively; and not having been requested to examine any witnesses on behalf of either of the said parties, do make and publish this my award in writing, of and concerning the matters to me referred, in manner following; that is to say; I *do* award and adjudge that the said [A. B.] shall and do forthwith pay to the said [C. D.], the sum of 100*l.*: *And* that the same be received by the said [C. D.] in full satisfaction and discharge of and for all the said matters in difference (*c*) to me referred, as aforesaid. IN WITNESS, &c.

Award that defendant shall pay lessor of plaintiff 100*l.* in full discharge of the matters referred.

The award need not state that it is made concerning the matters in difference, but it is prudent to state it.

(*c*) Upon the trial of an action of tort, a verdict was found for the plaintiff, subject to a reference of all matters in difference; the defendant claimed before the arbitrator a sum of money due to him upon the balance of an account, which was admitted by the plaintiff to be due: the award, without stating that it was made *of and concerning the premises*, directed a verdict to be entered for the plaintiff, with damages; and as the award recited that all matters in difference between the parties were referred to the arbitrator, it was held that this award was sufficient. *Gray* v. *Gwennap*, 1 Barn. and Ald. 106. However, it is prudent to state that the award is made *de premissis*. As to the words "*de premissis*," in pleading awards, *vide* Wms. n. 1 Saund. 324, (2).

AWARD *by two Arbitrators, under cross Bonds, on a general Reference by A. B. and C. D., two Copartners, That A. B. shall pay a Sum of Money to C. D., and give him a* GENERAL RELEASE; *that the Implements, &c. in a Sail-Cloth Manufactory shall become the Property of A. B.; and that the Copartnership Debts shall be got in, and equally divided.*

BETWEEN CO-PARTNERS, OF PAYMENT, GENERAL RELEASE, &C.

TO ALL TO WHOM THESE PRESENTS SHALL COME, WE [*two arbitrators*] of, &c. *send Greeting*. WHEREAS divers differences and disputes have arisen, and are now depending, between [A. B.] of, &c. and [C. D.] of, &c., touching and concerning, &c. (*set forth the matters in dispute briefly*). AND WHEREAS, for the purpose of putting an end to, and determining the said differences and disputes, the said [A. B.] and [C. D.] have bound themselves each to the other, in the sum of one thousand pounds of lawful money of Great Britain [and Ireland], by several bonds or obligations, bearing date on or about the fourth day of May now last past, conditioned respectively to be void upon their respectively observing and performing the award, arbitration, and determination of the said [*two arbitrators*], arbitrators indifferently named, elected and chosen, as well on the part and behalf of the said [A. B.], as of the said [C. D.], to arbitrate, award, order, judge, and determine of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sum and sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time thentofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by and between the said parties, or either of them; and so as the said award should be

Recital of differences between two co-partners.

Recital of cross bonds of submission to the award of two arbitrators, on a general reference,

so as the award

BETWEEN COPARTNERS, OF PAYMENT, GENERAL RELEASE, &c.

made in writing, under the hands and seals of the said arbitrators, and ready to be delivered to the parties in difference on or before the first day of January now next ensuing. Now KNOW YE, that we, the said [*two arbitrators*], having heard and carefully attended to and considered the several allegations of the said parties in difference, and also having duly examined, attended to, and carefully considered the allegations and evidence of the several witnesses of the said parties in difference, and the several books of account, and other vouchers produced by them, and laid before us, *Do*, by these presents, award and order, *That* the said [A. B.] shall and do, on the twentieth day of January now next ensuing, between the hours of ten and twelve in the forenoon of the same day, and at or in the dwelling house of, &c. pay or cause to be paid, the sum of (two hundred pounds) of lawful money of Great Britain [and Ireland], unto the said [C. D.], his executors or administrators, or to such person or persons as he or they, by any note or writing under his or their hand or hands, shall appoint to receive the same; such note or writing to be, previously to such payment, produced and shewn to the said [A. B.], and to be, immediately after such payment, delivered to him. AND we do also award and order, that the said [A. B.] shall, at his own expense, prepare, and in due form of law execute, in the presence of two or more credible witnesses, who shall thereunto subscribe their names, as witnesses attesting the execution of the same, a release to the said [C. D.], his heirs, executors, administrators, and assigns, of all, and all manner of action and actions, &c. (*ut ante*, 4.) whatsoever, which he the said [A. B.], at the date and execution of the said several bonds or obligations, had, or might, or could have had, claimed, challenged, or demanded against the said [C. D.] for or on account of all or any of the matters and things thereby submitted to our award and arbitration as aforesaid: *And* the said release being so executed, attested, and subscribed as aforesaid, he the said [A. B.] shall give and deliver, or cause to be given and delivered, the same unto the said [C. D.], his executors or administrators, on the day, and at the time and place aforesaid. AND we do award and order, that all the implements, utensils,

be made by a given day.

Testatum.

Award of payment of a sum by A. B. to C. D.

and a general release to be given by A. B. to C. D.

Implements, &c. in a sail

BETWEEN CO-PARTNERS, OF PAYMENT, GENERAL RELEASE, &c.

and materials belonging to the said [A. B.] and [C. D.], as copartners in the sail-cloth manufactory which they now carry on at aforesaid, shall from henceforth be and become the sole property of the said [A. B.], and be held and enjoyed by him as such, exclusive of the said [C. D.]. And lastly, we do award and order, that all debts, sum and sums of money, now due and owing to the said [A. B.] and [C. D.], as copartners, and which are still remaining unpaid and unsatisfied, shall be got in, collected, recovered, and received, as soon as conveniently may be after the date of these presents: *And*, that after deducting the costs and expenses attending the collecting, recovering, and getting in the said debts, sum and sums of money, the money to arise from thence, shall, as to one moiety thereof, belong and be paid to the said [A. B.], his executors, administrators, or assigns; and the other moiety thereof to the said [C. D.], his executors, administrators, or assigns. In witness, &c.

cloth manufactory to become the property of A. B.

Co-partnership debts to be got in, and

equally divided.

ACTION TO CEASE, PAYMENT, AND GENERAL RELEASE.

AWARD (*a*) *that an Action shall cease; that A. B. shall pay C. D.* 103*l.* *with Costs of the Action, to be taxed by the Officer of the Court, and* 6*l. a Moiety of the Expenses of the Award, by Instalments, viz.* 43*l., part of the* 103*l. with the Costs, and* 6*l. on the First of February next; and* 60*l. on the First of April next: that C. D. shall, within Ten Days after Payment of the* 60*l. execute a general Release to A. B.; if such Release should be prepared at A. B.'s Costs, and tendered: that if Default be made in Payment, the Money shall become instantly due, and that C. D. may immediately sue for it.*

Award that an action shall cease: that A. B. shall pay C. D. 103*l.*

I DO award, order, and direct, *That* the said action at law shall cease, and be no further prosecuted: AND that the said [A. B.], his executors or administrators, shall and do pay to the said [C. D.], his executors or administrators, or such other person as he or they shall or may lawfully authorise to receive the same, at the office of [Messrs. E. and F.], attorneys at law, in Lincoln's Inn, the sum of 103*l.* together with the costs of the said action, to be taxed by the proper officer of the said court; *And* the further sum of 6*l.* as and for one moiety of the expenses of this my award, at the times and in manner following; that is to say; the sum of 43*l.* parcel of the said sum of 103*l.* together with the costs of the said action, and the said sum of 6*l.* on the first day of February now next ensuing, between the hours of twelve and two in the afternoon; *And* the further sum of 60*l.* on the first day of April now next ensuing, between the same hours: AND I do further award,

with taxed costs of action; and 6*l.* for moiety of expenses of award, by instalments, viz. 43*l.* part of the 103*l.* with the costs, and 6*l.* on the 1st Feb. next; and 60*l.* on the 1st of April next:

The solicitor of one of the parties may prepare the award.

(*a*) The circumstance that an award was prepared by the solicitor of one of the parties, though indelicate, is no ground for setting aside the award. *Fetherstone* v. *Cooper*, 9 Ves. 68.

ACTION TO CEASE, PAYMENT, AND GENERAL RELEASE.

order, and direct, that the said [C. D.], his executors and administrators, shall and do, within ten days after payment of the said last mentioned sum, seal and deliver to the said [A. B.], his executors and administrators, a general release of all actions, claims, and demands, up to the day of the date of the said submission, if such release, prepared at the costs of the said [A. B.], his executors or administrators, should be tendered or left for him at the said office, on the said first day of May, at the time of the payment of the said last mentioned sum of 60*l.*: AND LASTLY, I do order, award, and direct, that if default should be made in payment of all, either, or any part of the sums of money herein by me directed to be paid, at the place and times in that behalf appointed, then and thenceforth all the monies directed herein to be paid, or so much thereof as shall be then unpaid, shall become instantly due and payable; *And* that the said [C. D.] his executors or administrators, may immediately use such lawful means for obtaining payment thereof, as he might have done if the whole of the said sum of 103*l.* together with the several costs aforesaid, or such part thereof as shall then remain unpaid, had been herein directed to be paid on the day at which such default shall happen to be made. IN WITNESS, &c.

that C. D. shall within ten days after payment of the 60*l.* execute a general release to A. B.;

if such release should be prepared at A. B.'s costs, and tendered;

that if default be made in payment, the money shall become instantly due;

and that C. D. may immediately sue for it.

BETWEEN SOLICITOR AND CLIENT.

AWARD *that a Sum is due to a Solicitor; that he has a Lien upon the Client's Papers for it; that the Sum be paid on, &c. and that the Solicitor accept it, in full of all Demands for the Business referred.*

Award that a sum is due to a solicitor:

NOW KNOW YE, that I, the said [*arbitrator*], having heard, &c. *do* by these presents award and adjudge, that at the date of the said submission, there was, and now is, due and owing to the said [A. B.], by the said [C. D.], for and upon the several matters referred to me as aforesaid, the sum of pounds, and no more. AND I do further award, that the said [A. B.] has a lien (*a*) upon all deeds, papers, and writings in the custody or possession of him the said [A. B.] belonging or relating to the affairs of the said [C. D.] for the payment of the said sum of pounds. *(Add award and order that C. D. pay, on, &c. at, &c. the said sum of , &c.* ut ante, 20:) AND I do further award and order, that the said [A. B.] shall accept of, and receive from the said [C. D.], the said sum of pounds, in full satisfaction of all demands for such business done and money due, paid, laid out, and expended, as is hereinbefore mentioned. IN WITNESS, &c.

that he has a lien upon the client's papers for the sum:

that the sum be paid:

and that the solicitor accept the sum, in full of all demands for business referred.

A solicitor has a general lien on all papers, excepting copyhold muniments.

(*a*) Although a solicitor has a lien on all papers delivered to him in that character, not only for professional business in the matter of the papers, but for all professional business whilst they remain in his hands; yet he has no lien, as solicitor, on papers which he receives as steward of a manor. *Chapernown* v. *Scott*, 6 Madd. 93. *Vide ante*, Vol. II. 472, (*d*). [See as to a solicitor's lien in an award. *Symons* v. *Mills*, 8 Taunt. 526.]

ON BREACHES OF HUSBANDRY COVENANTS.

AWARD (*a*) *by Three Arbitrators, on a Submission of Breaches of Husbandry Covenants, that the Lessee shall pay the Receiver of the Estate a certain Sum for Damage, which the Arbitrators find to have been occasioned by the Lessee's having farmed contrary to the Four Years' Course of Husbandry, and by Breaches of Covenants: such Sum to be accepted by the Receiver as a full Compensation: the Costs of the Reference to be paid by the Lessee: the Damages, and Costs of Reference, to be paid by the Lessee to the Receiver, by Two Instalments: the Lessee, during the Remainder of the Term, to farm according to the Course of Husbandry mentioned in a Schedule: and the Lessee, at his own Expense, to enter into a Deed of Covenants with the Receiver, to farm accordingly.*

Exordium.

TO ALL TO WHOM THESE PRESENTS SHALL COME, WE [*arbitrator*], of , in the county of , farmer; [*arbitrator*], of , in the same county, farmer; and [*other arbitrator*], of , in the same county, farmer, *Send Greeting*.

Recital of lease of a farm;

WHEREAS by indenture of lease, bearing date on or about the day of 18 , and expressed to be made between [*lessor*], esquire, since deceased, of the one part; and [*lessee*], of , in the said county of , farmer, of the other part; the said [*lessor*] *did* demise and let unto the said [*lessee*], his executors and administrators, A certain messuage, called, &c. (*Recite the Remainder of the Lease, Lessor's Death, and Appointment of Receiver*, ut ante, Vol. II. 616.)

Lessor's death, and appointment of receiver.

AND WHEREAS the said [*lessee*] did not farm or cultivate the said arable lands, part of the said farm, according to the course prescribed by the said recited

Recital that lessee did not follow the six years' course

(*a*) See the submission on which the above award is founded, *ante*, Vol. II. 615.

Reference to other forms, relating to the above award.

See a deed of covenants in pursuance of the award, *post*, COVENANT, title AWARD [149.]

ON BREACHES OF HUSBANDRY COVENANTS.

of husbandry prescribed by the lease;

the lessee, alleging that the lessor agreed to permit the four years' course; that the receiver allowing such permission, alleges that the lessee has not followed the four years' course;

and that he had broke other covenants, whereby the premises had sustained damage:

for which breaches, receiver threatened to commence ejectment:

and that to prevent ejectment, lessee proposed, and receiver consented, to refer to three arbitrators, or any two of them, the question, whether any, and what damage, had been

covenant (and which is called the six years' course of husbandry), the said [*lessor*] having in his lifetime, as he the said [*lessee*] alledged, agreed to dispense with the said covenant, and to permit the said [*lessee*] to farm the said lands in the course of husbandry called the four years' course. And whereas the said [*receiver* (*b*)] (allowing the said [*lessee*] the full benefit of the permission so stated to have been given to him as aforesaid) alleged that the said [*lessee*] had not farmed or cultivated the said lands according to the said four years' course of husbandry; and also that he had done, or omitted to do, divers acts, matters, and things, contrary to and in breach of the other covenants, conditions, and agreements contained in the said indenture of lease, whereby the lands so demised to him as aforesaid had sustained great damage and injury: *And* in consequence of such breaches, or alleged breaches, by the said [*lessee*], of such covenants as aforesaid, the said [*receiver*] threatened to commence an action of ejectment against the said [*lessee*] for the recovery of the possession of the said premises. And whereas, in order to prevent such action as aforesaid, the said [*lessee*] proposed to the said [*receiver*], and the said [*receiver*] consented and agreed, that it should be referred to us, or any two of us (*c*), to settle and determine by our award, whether any, and what damage had been occasioned to the said farm and hereditaments comprised in the said lease, in consequence or by reason of the said [*lessee*] having at any time or times, since the day of 1811, farmed, or

(*b*) A Chancery receiver cannot submit breaches of a lease, without the court's order. *Vide ante*, Vol. II. 615, (*a*); 426, (*b*).

Two arbitrators may make an award, if the third, after notice, absents himself.

(*c*) When a cause is referred to three persons, and they, or any two of them, are empowered to make an award, although one of the three never attended any of the meetings of the referees, an award made by two of them is good, if the third had due notice of the several meetings appointed, and of the several matters referred: but if he had no such notice, then such an award is bad. *Dalling* v. *Matchett*, Willes, 215. Barnes, 57, S. C. [Where there are three arbitrators appointed, it is improper for two to meet alone, excluding the third, or not giving him notice, if they receive evidence or hear discussions; but *semble*, where all the evidence has been heard in the presence of the third, the award will not be set aside because it was signed in his absence. *Goodman* v. *Sayers*, 2 Jac. & W. 261. *Ed.*]

otherwise managed the same, contrary to the said four years' course of husbandry, or by reason or in consequence of the said [*lessee*], having since the time aforesaid, committed any breach or breaches in, or otherwise acted contrary to any of the covenants, clauses, conditions, and agreements, in the said indenture of lease contained (except the covenant to farm in the six years' course hereinbefore recited; and except in all those cases in which it should appear to us, the said arbitrators, or any two of us, that the said [*lessee*] had acted pursuant to a permission given him by the said [*receiver*], or by the said [*lessor*], deceased): *And also* to settle and determine by our said award, what sum or sums (if any) should be paid by the said [*lessee*] to the said [*receiver*], as a compensation for such damages, and in what manner, and at what time and place the same should be paid: *And also* to direct by our said award, in what order, course, and manner the said premises should be farmed, managed, and carried on during the remainder of the said term of twenty-one years; *And* whether any, and what agreements, or other assurances, should be made or executed by the said [*receiver*] and [*lessee*], or either of them. AND WHEREAS in pursuance of the said agreement, the said [*receiver*] and [*lessee*] have become bound to each other by their several bonds or obligations in writing, bearing date on or about the day of last past, to stand to, obey, observe, perform, fulfil, and keep the award, arbitrament, judgment, final end, and determination of us the said [*three arbitrators*], which we, or any two of us, should make of and concerning the several matters and things so agreed to be referred to us as aforesaid: *And also* to pay all such sum and sums of money, and make and execute such agreement or agreements, or other assurances, as we, or any two of us, should by our said award, order, direct, or appoint: *And* to make such payment or payments respectively, and every of them, at such time or times, place or places, and in such manner, as we, or any two of us, should by our said award, order and direct: *And* to make and execute such agreement or agreements, or other assurances, within the time or respective times to be thereby limited in that

ON BREACHES OF HUSBANDRY COVENANTS.

occasioned by lessee's having farmed contrary to the four years' course; or by any breaches of covenants,

(excepting as to the six years' course, and cases in which he has acted by permission of receiver or lessor);

to settle the sums to be paid for such damages;

and to direct the future course of husbandry;

and what agreements should be executed by lessee and receiver.

Recital of cross bonds to abide by award of three, or any two of them;

and to pay such sums, and execute such agreements, as arbitrators should award.

ON BREACHES OF HUSBANDRY COVENANTS.

behalf (*d*). And *it was agreed* that the said costs and charges of the said bonds and obligations, and all costs, charges, and expenses of and attending, or incidental to the said arbitration and award, should be borne and paid by the said [*lessee*] and [*receiver*] jointly, or by either of them separately, as we, or any two of us, should by our said award direct. Now know ye, that we the said [*three arbitrators*], arbitrators, as aforesaid having taken upon us the charge of the said arbitration and award, and having heard and considered the allegations and proofs made, adduced, and brought before us by the said parties, *do* make our award of and concerning the premises, in manner following; that is to say; First *We* do award, order, adjudge, and determine, that the said [*lessee*], his executors, administrators, or assigns, shall pay to the said [*receiver*] the sum of hundred and pounds of lawful money of Great Britain [and Ireland], as a full compensation and recompence for the damage, which we find and determine to have been occasioned to the said farm and hereditaments, in consequence and by reason of the said [*lessee*] having, since the day of 1811, farmed, or otherwise managed the same, contrary to the said four years' course of husbandry; and in consequence and by reason of the breaches by the said [*lessee*] of the covenants and agreements in the said lease contained (except the said covenant, to farm in the six years' course of husbandry). And we do further award, order, adjudge, and determine, that the said sum of hundred and pounds, shall be accepted and taken by the said [*receiver*], as a full compensation and recompence for such damage accordingly. And we do also award, order, adjudge, and determine, that the costs and charges of the said bonds or obligations, and of and attending or incident to the said reference, arbitration, and award (which we do tax and assess at the sum of pounds

Recital of agreement, that costs of reference should be borne jointly or separately, as arbitrators should award.

Testatum.

Award that lessee shall pay receiver a certain sum for the damage which the arbitrators find to have been occasioned by lessee's having farmed contrary to the four years' course, and by breaches of covenants (except six years' course):

such sum to be accepted by receiver as a full compensation:

the costs of reference to be paid by lessee:

(*d*) It is usual to add the *ita quod* in the award, in order that it might appear on the face of the award that it was made within the time limited. See the *ita quod* of the above submission, *ante*, Vol. II. 619. And see further, *ante*, Vol. II. 583, (*b*); 628, (*b*).

The *ita quod* should be stated in the award.

in the whole), shall be paid by the said [*lessee*] : *And that* the said sum of hundred and pounds, the amount of such damages as aforesaid, and the sum of pounds, the amount of such costs, charges, and expenses as aforesaid, shall be paid by him the said [*lessee*] to the said [*receiver*], in the proportions, and at the times and place next hereinafter mentioned ; namely, that the sum of hundred pounds, part of the said sum of hundred and pounds, and the said sum of pounds, the amount of such costs, charges, and expenses as aforesaid, shall be paid by the said [*lessee*] to the said [*receiver*], at his dwelling-house, in aforesaid, on the day of now next ensuing ; and that the sum of hundred and pounds, residue of the said sum of hundred and pounds, shall be paid by the said [*lessee*] to the said [*receiver*], at his said dwelling-house, in aforesaid, on the day of [which will be in the year] 18 . And we do also award, order, adjudge, and determine, that the said [*lessee*] shall henceforth, for and during all the remainder of the said term of twenty-one years, so granted to him by the said indenture of lease as aforesaid, farm, cultivate, and manage the said lands and hereditaments, as well pasture as arable, in the manner, according to the course, and with the succession and alteration of crops particularly mentioned, expressed, and declared in the schedule for that purpose prepared and settled by us, and annexed to and to be considered and taken as part of this our award. And we do lastly award, order, adjudge, and determine, that the said [*lessee*] shall, at his own expense, and on or before the day of next, enter into a deed of covenants with the said [*receiver*], to farm, cultivate, and manage the said lands and hereditaments accordingly. In witness whereof we have hereunto subscribed our hands and affixed our seals, on the day of in the year 18 .

ON BREACHES OF HUSBANDRY COVENANTS.

the damages, and costs of reference to be paid by lessee to receiver, by two instalments :

lessee, during remainder of term, to farm according to course of husbandry mentioned in schedule :

and lessee, at his own expense, to enter into deed of covenants with receiver to farm accordingly.

Testimonium.

THE SCHEDULE to which the above written (*or* annexed) award refers.

Schedule.

OF RIGHT TO PART OF RAIN WATER ON A ROOF, AND NOT TO FIX SCALES NEAR A BEAM.

AWARD *that A. B. may divide the Roof and Gutters of the Shop of C. D. with Lead, or other Materials, forming a Partition not more than One Foot high from the Surface; and to maintain the same when made, in order that such Water only as shall fall on the Eastern Side of the Roof, may be conveyed to A. B.'s Leaden Flat; and that A. B. shall afterwards only convey to the Leaden Flat such Rain Water as shall fall on the Eastern Side of the Roof: that A. B. may put up and maintain a Leaden or other Sink under the Window of his First Floor, and over C. D.'s Roof, for conveying Water: that C. D. shall take down a large Beam or Scales in his Shop, suspended under A. B.'s House; and shall not fix any Beam or Scales (except for weighing Parcels not exceeding Twenty Pounds Weight), under A. B.'s House, or within Ten Feet of a certain Beam under it.*

Award that A. B. may divide the roof and gutters of the shop of C. D. with lead or other materials, forming a partition not more than one foot high from the surface;

and to maintain same when made;

in order that such water only as shall fall on eastern side of roof, may be

NOW KNOW YE, *That* I, the said [*arbitrator*], the arbitrator, having, &c. do hereby award and direct, that the said [A. B.] shall be at liberty, without the let or disturbance of the said [C. D.], on the day of now next ensuing, or any time within three calendar months after that day, to divide the roof and gutters of the back shop of the said [C. D.], at the north and south ends, in the middle, or more eastward than the middle thereof, with lead, iron, or other materials, forming a partition not more than one foot high from the surface of the said gutters; and to maintain and preserve such partition when made; in order that such water only as shall from time to time fall on the eastern side of the said roof of the said back shop, may be conveyed to the leaden flat of the said [A. B.]: *And* that the said [A. B.] do not, at any time

after such partition shall be made, by any pipe or other device, convey to the said leaden flat any other water than such rain-water as shall naturally fall on the eastern side of the said roof. And I do further award and direct, that the said [A. B.] shall be at liberty, without the let or disturbance of the said [C. D.], at any time within twelve calendar months now next ensuing, to put up, and continually thereafter maintain, a leaden or other sink, or trunk, under the window on the first floor of his said dwelling-house, and over the said roof of the said back shop of the said [C. D.], for the conveyance of water to the east side of the said roof, and so on, in any other manner, to the said leaden flat, and away therefrom by the drain or gutter by which the water now flows away from the said leaden flat. And I do further award and order, that the said [C. D.] shall and do, on or before the first day of June now next ensuing, take down, and wholly remove, the large beam or scales in his shop, and which is suspended from or near to a certain beam under the said dwelling-house of the said [A. B.] at the north side of the same house; and shall not, nor do, at any time after the first day of June now next ensuing, fix or suspend the said beam or scales, or any other beam or scales (except such as shall be used for the weighing of small parcels, not exceeding twenty pounds weight, in the course of his retail trade) to, upon, or from the said beam, under the said dwelling-house of the said [A. B.], or any other beam or rafter, or in any other way or manner, under the said dwelling-house of the said [A. B.], or in any part of the shop of him the said [C. D.], within ten feet of the aforesaid beam, under the house of the said [A. B.].

OF RIGHT OF PART OF RAIN WATER ON A ROOF, AND NOT TO FIX SCALES NEAR A BEAM.

conveyed to A. B.'s leaden flat;

and that A. B. shall afterwards only convey to leaden flat such rain water as shall fall on eastern side of roof:

that A. B. may put up and maintain a leaden or other sink under the window of his first floor, and over C. D.'s roof, for conveying water:

that C. D. shall take down a large beam or scales in his shop, suspended under A. B.'s house;

and shall not fix any beam or scales, (except for weighing parcels not exceeding twenty pounds weight), under A. B.'s house, or within ten feet of a certain beam under it.

TENANT TO MAKE A FENCE, LANDLORD A LEASE.

AWARD *that an intended Lessee, in possession, shall, on or before the Second of March,* MAKE A FENCE *across a Yard, according to a Plan drawn on the Award; and maintain the same during the intended Lease, and any Renewal: that the Landlord shall, on the Third of March,* EXECUTE A LEASE *to the intended Lessee, of the Premises in his Occupation, excepting that Part of the Yard to be taken off; such Lease to be conformable to an Engrossment, formerly tendered, excepting the Reservation of a Right of Way; the Lease to bear Date subsequent to making the Fence, whereby the Description of the Premises, as being in the Occupation of the Lessee, will be correct:* AND *that the Lessee shall execute a* COUNTERPART.

Award that intended lessee in possession shall, on or before 2d March, make a fence across a yard, according to a plan drawn on the award;

NOW KNOW YE, *That* I, the said [*arbitrator*], having, &c, do make this my award in writing, of and concerning the matters so to me referred as aforesaid, in manner following; that is to say; I do award, order, and adjudge, that the said [A. B.] shall, on or before the second day of March now next ensuing, at his own expense, erect and make a sufficient fence of paling, or wall, but not exceeding the height of six feet, from that corner of his garden which is marked with the letter *A.* on the plan drawn on this my award, across the yard, now in the occupation of the said [E. F.], to that corner of the stable, in the occupation of the said [A. B.], which is marked with the letter *C.* on the said plan, according to a line drawn in red ink on the said plan, whereby a part of the said yard will be taken off, and laid to the premises in the occupation of the said [A. B.]: *And* that the said [A. B.], his executors, administrators, or assigns, do maintain and

and maintain same during intended lease, and any renewal;

repair such fence or wall, during the term of the lease hereinafter mentioned, and any further term that may be granted in pursuance thereof. And I do further award, order, and direct, that the said [A. B.] shall and do, on the third day of March now next ensuing, seal, and deliver to the said [E. F.], a lease of the premises now in the occupation of the said [E. F.], except the said part of the said yard so to be taken off as aforesaid; which lease shall be, in all respects, conformable to the engrossment of a lease heretofore tendered to the said [A. B.] for his execution (and on the back whereof I have subscribed my name), except in the particulars following; that is to say; the exception or reservation of a right of way contained in the said engrossment, shall be wholly omitted; and the said lease shall bear date on a day subsequent to the making of the said fence or wall, instead of the 18th day of August, 18 ; whereby the description of the premises, as being in the occupation of the said [E. F.], will, by reason of the erection of the said fence or wall, be correct, and will not require alteration. And I do further award, order, and direct, that the said [E. F.] shall and do duly seal and deliver to the said [A. B.], a counterpart of the lease hereinbefore directed to be made.

TENANT TO MAKE FENCE, LANDLORD A LEASE.

that landlord shall, on 3d March, execute a lease to intended lessee of the premises in his occupation, excepting that part of the yard to be taken off; such lease to be conformable to an engrossment; formerly tendered, excepting the reservation of a right of way; the lease to bear date subsequent to making fence, whereby description of premises, as being in occupation of lessee, will be correct: and that lessee shall execute a counterpart,

OF RENT DUE FROM LESSEE, AND DAMAGES FOR BREACH OF COVENANTS.

AWARD *that one Year's Rent was due from a Lessee: that the Lessee did not perform the Covenants of the Lease, except as to Payment of the first Year's Rent: that Lessor has thereby sustained Damage to a certain Amount: that Lessee shall pay the Sums awarded on a certain Day.*

Award that one year's rent was due from lessee:

NOW KNOW YE, that I the said [*arbitrator*], having, &c. do make this my award, of, and concerning the matters so referred to me as aforesaid, in manner following, that is to say; I do find and award, that at the time of commencing the said action, there was and now is justly due and owing from the said [C. D.] to the said [A. B.], for the rent of the said premises, for one year from the expiration of the term granted by the said lease as aforesaid, to the said 29th day of September, 18 , as aforesaid, the sum of 634*l.* *And* I do further find and award, that the said [C. D.], during his possession of the said premises, under and by virtue of the said indenture of lease, and the assignment thereof, as aforesaid, did not perform, fulfil, or keep the covenants in the said indenture contained, and hereinbefore mentioned, as aforesaid, except as to the payment of the first rent of 37*l.* a year thereby reserved; but broke the same, contrary to the true intent and meaning of the said lease, and the said covenants. *And* I do further find and award, that the said [A. B.] hath sustained damage, by reason of the nonperformance of the said covenants by the said [C. D.], to the amount of 366*l.*: *And* as to the said sum of 366*l.*, and the said sum of 634*l.*, so by me also awarded, as aforesaid, (making together the sum of 1,000*l.*) I do award that the said [C. D.] shall and do, on, &c., at, &c., pay, or cause to be paid, the said sum of 1,000*l.* unto the said [A. B.], or to such person or persons as she may lawfully authorize to receive the same. (*Add award as to costs; and that A. B. shall execute a general release to C. D.*)

that lessee did not perform covenants of lease,

except as to payment of first year's rent:

that lessor has thereby sustained damage to a certain amount;

that lessee shall pay the sums awarded, on, &c.

TENANT TO REBUILD HOUSE DESTROYED BY FIRE.

AWARD (*a*) *by one Arbitrator, under Cross Deeds Poll of Submission, by Landlord and Tenant, where the Time for making the Award had been enlarged by the Arbitrator under a Power in the Submission, That the Tenant was liable to* REBUILD *a Dwelling House and Premises destroyed by* FIRE.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*arbitrator*], of the inner Temple, Barrister at Law, *send* Exordium.

(*a*) It may be of use here to add something on the progress of the law, as to the accidental burning of houses, and on the liabilities of particular tenants, as connected with the doctrine of waste. At the common law, lessees were not answerable to landlords for accidental or negligent burning; for as to fires by accident, it is expressed in Fleta, that *fortuna ignis vel hujusmodi eventûs inopinati omnes tenentes excusant;* Fleta, lib. I. cap. 12. § 20. p. 15. edit. 1735; and Lady *Shrewsbury's* case, 5 Co. 13, is a direct authority that lessees for life or years were equally excusable for fires by *negligence.*

At common law, lessees were not answerable for accidental fires.

Then came the statute of Gloucester, 6 Edw. I. c. 5; by which "it is provided, that a man henceforth shall have a writ of waste in the Chancery against him who holds by the curtesy of England, or otherwise for term of life, or for term of years, or a woman in dower. And he that shall be attainted of waste, shall forfeit the thing which he has wasted; and moreover shall recompence thrice so much as the waste shall be taxed at." 2 Inst. 299.

The statute of Gloucester gave a remedy against tenants for life or years.

By this statute the lessor may now have an action of waste, or upon the case in the nature of waste, against the lessee, if he permits the house to be out of repair, unless it was ruinous at the time of the lease. Co. Litt. 54. b. Wms. n. 1 Saund. 323, *a* (7). For the statute extends to *permissive,* as well as *voluntary* waste. 2 Inst. 145. Co. Litt. 53. a. 2 Roll. Abr. 816. However, a tenant at will is not punishable for *permissive* waste. Litt. s. 71. Co. Litt. 57. a. Thus in the Countess of *Shrewsbury's* case, 5 Co. 13, she brought an action on the case against her tenant at will for so negligently keeping

But a tenant at will is not punishable for permissive waste.

TENANT TO REBUILD HOUSE DESTROYED BY FIRE.

Greeting. WHEREAS, on or about the eleventh day of December, now last past, a certain deed poll was made and executed by [A. B.] of, &c.; and a certain other deed poll was on the same day made and executed by [C. D.] of, &c., in which said two several deeds poll, *after reciting* that a certain messuage or dwelling-house, and certain other buildings, situate and being No. 54, Lower Shadwell, in the parish of St. Paul, Shadwell, in the county of

Recital of cross deeds poll of landlord and tenant, reciting that buildings were destroyed by fire;

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his fire, that the house was burnt; and the whole court held, that neither an action on the case, nor any other action, lay; because at common law, and before the statute of Gloucester, an action did not lie for waste against a lessee for life or years, having an interest in the land by the act of the lessor; and that it was the lessor's folly to make such a lease, and not restrain him by covenant, condition, or otherwise, that he should not do waste. So, and for the same reason, it was held, that a tenant at will should not be punished for permissive waste, he not being within the statute. The Countess of *Shrewsbury* v. *Crompton*, Cro. Eliz. 777. 784. S. C. *Panton* v. *Isham*, 3 Lev. 359. 1 Vin. Abr. 217, (B. 3.). But this means a tenant at will in the strict sense of the word, and not tenant from year to year, for he is within the statute. Bro. Abr. *Waste*, pl. 52. 2 Roll. Abr. 828, pl. 11. 22 Vin. Abr. 469. 2 Inst. 302. Co. Litt. 54. b. And the courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be estates at will, but have rather held them to be tenancies from year to year, so long as doth parties please; especially where an annual rent is reserved. 2 Bla. Com. 147. In *Timmins* v. *Rowlinson*, 3 Burr. 1609, Mr. Justice Wilmot said, that "in the country, leases at will, in the *strict* legal notion of a lease at will, being found extremely inconvenient, exist only *notionally*, and were succeeded by another species of contract, which was less inconvenient." But this observation means, not that estates at will may not arise now as well as formerly, but only that it is no longer usual to create such estates by *express* words, and that the judges incline strongly against *implying* them. Harg. n. Co. Litt. 55, a. (3). [See further on this subject, Vol. IV. 404.]

though a tenant from year to year is within the statute.

Where no certain term is mentioned, the courts imply a tenancy from year to year.

Therefore, after the statute of Gloucester, an action of waste might be brought against tenant for life, or years, or even half a year, if his house was accidentally burnt by fire, this being a species of negligent or permissive waste. For, notwithstanding the statute speaks of one who holds for a term of years, in the plural number, yet, it appears by the

After the statute of Gloucester, an action of waste might have been brought against tenant for life,

Middlesex, were on or about the twenty-first day of 18 ; burnt down and destroyed by fire; *and* that at the time the same were so burnt down and destroyed by fire, the same were in the occupation of the said [A. B.], who claimed to hold the same as tenant of the said [C. D.]; *and* that by a memorandum or agreement made and entered into on the day of , 18 , between the said [A. B.], of the one part, and the said [C. D.], of

TENANT TO REBUILD HOUSE DESTROYED BY FIRE.

that at the time of the fire they were in the occupation of tenant; that by an agreement be-

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authority of Littleton, sec. 67, that although it be a penal law, whereby treble damages, and the place wasted shall be recovered, yet a tenant for half a year, being within the same mischief, shall be within the same remedy, though it be out of the letter of the law: for *qui hæret in literâ, hæret in cortice;* which is an excellent example, whereupon in many similar cases, a man may form a certain opinion. Co. Litt. 54, b. 2 Inst. 302.

or years, for accidental fire.

But now, by the 6 Anne, c. 31, as to waste, by buildings being destroyed by *fire*, the ancient law is restored, and the distinction introduced by the statute of Gloucester between tenants at will, and other lessees, is taken away. For the statute of Anne, s. 6, enacts, "that no action, suit, or process whatsoever, shall be had, maintained, or prosecuted, against *any person* in whose house or chamber any fire shall *accidentally* begin, or any recompence be made by such person for any damage suffered or occasioned thereby, any law, usage, or custom to the contrary notwithstanding: however, by sec. 7, it is "provided, that nothing in this act contained, shall extend to defeat, or make void any contract or agreement made between landlord and tenant." By sec. 8, so much of this act as related to the indemnity of any person in whose house or chamber any fire should accidentally begin, was temporary; but by 10 Anne, c. 14, s. 1, the 6th section of 6 Anne, chap. 31, was made perpetual. Although the 7th section is not mentioned in the 10th Anne, yet it seems that it was impliedly thereby also made perpetual, if it was necessary. But that question does not appear to be important; for *modus et conventio vincunt legem*. *Berryman* v. *Bowden*, Het. 59. *Cowper* v. *Andrews*, Hob. 40. *Lanyon* v. *Carne*, 2 Saund. 167. Co. Litt. 19, a. 166, a. 180, a.

But now, by the 6th Anne, no action can be maintained against any person whose house is accidentally burnt;

but not to annul any agreement between landlord and tenant.

Therefore, the doctrine that no action lies, should be understood with some limitation; for if tenant at will stipulates with his lessor to be responsible for fire by negligence, or for other permissive waste, without doubt an action will lie on such *express* agreement. The same observation holds with respect to tenants for life, or years, before the

Tenants at will, for life or years, may subject themselves to an action of waste, under an express agreement.

TENANT TO REBUILD HOUSE DESTROYED BY FIRE.

Greeting. WHEREAS, on or about the eleventh day of December, now last past, a certain deed poll was made and executed by [A. B.] of, &c.; and a certain other deed poll was on the same day made and executed by [C. D.] of, &c., in which said two several deeds poll, *after reciting* that a certain messuage or dwelling-house, and certain other buildings, situate and being No. 54, Lower Shadwell, in the parish of St. Paul, Shadwell, in the county of

Recital of cross deeds poll of landlord and tenant, reciting that buildings were destroyed by fire;

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his fire, that the house was burnt; and the whole court held, that neither an action on the case, nor any other action, lay; because at common law, and before the statute of Gloucester, an action did not lie for waste against a lessee for life or years, having an interest in the land by the act of the lessor; and that it was the lessor's folly to make such a lease, and not restrain him by covenant, condition, or otherwise, that he should not do waste. So, and for the same reason, it was held, that a tenant at will should not be punished for permissive waste, he not being within the statute. The Countess of *Shrewsbury* v. *Crompton*, Cro. Eliz. 777. 784. S. C. *Panton* v. *Isham*, 3 Lev. 359. 1 Vin. Abr. 217, (B. 3.). But this means a tenant at will in the strict sense of the word, and not tenant from year to year, for he is within the statute. Bro. Abr. *Waste*, pl. 52. 2 Roll. Abr. 828, pl. 11. 22 Vin. Abr. 469. 2 Inst. 302. Co. Litt. 54. b. And the courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be estates at will, but have rather held them to be tenancies from year to year, so long as doth parties please; especially where an annual rent is reserved. 2 Bla. Com. 147. In *Timmins* v. *Rowlinson*, 3 Burr. 1609, Mr. Justice Wilmot said, that "in the country, leases at will, in the *strict* legal notion of a lease at will, being found extremely inconvenient, exist only *notionally*, and were succeeded by another species of contract, which was less inconvenient." But this observation means, not that estates at will may not arise now as well as formerly, but only that it is no longer usual to create such estates by *express* words, and that the judges incline strongly against *implying* them. Harg. n. Co. Litt. 55, a. (3). [See further on this subject, Vol. IV. 404.]

though a tenant from year to year is within the statute.

Where no certain term is mentioned, the courts imply a tenancy from year to year.

Therefore, after the statute of Gloucester, an action of waste might be brought against tenant for life, or years, or even half a year, if his house was accidentally burnt by fire, this being a species of negligent or permissive waste. For, notwithstanding the statute speaks of one who holds for a term of years, in the plural number, yet, it appears by the

After the statute of Gloucester, an action of waste might have been brought against tenant for life,

Middlesex, were on or about the twenty-first day of 18 ; burnt down and destroyed by fire ; *and* that at the time the same were so burnt down and destroyed by fire, the same were in the occupation of the said [A. B.], who claimed to hold the same as tenant of the said [C. D.] ; *and* that by a memorandum or agreement made and entered into on the day of , 18 , between the said [A. B.], of the one part, and the said [C. D.], of

TENANT TO REBUILD HOUSE DESTROYED BY FIRE.

that at the time of the fire they were in the occupation of tenant ; that by an agreement be-

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authority of Littleton, sec. 67, that although it be a penal law, whereby treble damages, and the place wasted shall be recovered, yet a tenant for half a year, being within the same mischief, shall be within the same remedy, though it be out of the letter of the law : for *qui hæret in literâ, hæret in cortice ;* which is an excellent example, whereupon in many similar cases, a man may form a certain opinion. Co. Litt. 54, b. 2 Inst. 302.

or years, for accidental fire.

But now, by the 6 Anne, c. 31, as to waste, by buildings being destroyed by *fire*, the ancient law is restored, and the distinction introduced by the statute of Gloucester between tenants at will, and other lessees, is taken away. For the statute of Anne, s. 6, enacts, "that no action, suit, or process whatsoever, shall be had, maintained, or prosecuted, against *any person* in whose house or chamber any fire shall *accidentally* begin, or any recompence be made by such person for any damage suffered or occasioned thereby, any law, usage, or custom to the contrary notwithstanding : however, by sec. 7, it is "provided, that nothing in this act contained, shall extend to defeat, or make void any contract or agreement made between landlord and tenant." By sec. 8, so much of this act as related to the indemnity of any person in whose house or chamber any fire should accidentally begin, was temporary ; but by 10 Anne, c. 14, s. 1, the 6th section of 6 Anne, chap. 31, was made perpetual. Although the 7th section is not mentioned in the 10th Anne, yet it seems that it was impliedly thereby also made perpetual, if it was necessary. But that question does not appear to be important ; for *modus et conventio vincunt legem*. *Berryman* v. *Bowden*, Het. 59. *Cowper* v. *Andrews*, Hob. 40. *Lanyon* v. *Carne*, 2 Saund. 167. Co. Litt. 19, a. 166, a. 180, a.

But now, by the 6th Anne, no action can be maintained against any person whose house is accidentally burnt ;

but not to annul any agreement between landlord and tenant.

Therefore, the doctrine that no action lies, should be understood with some limitation ; for if tenant at will stipulates with his lessor to be responsible for fire by negligence, or for other permissive waste, without doubt an action will lie on such *express* agreement. The same observation holds with respect to tenants for life, or years, before the

Tenants at will, for life or years, may subject themselves to an action of waste, under an express agreement.

TENANT TO REBUILD HOUSE DESTROYED BY FIRE.

the tenant is liable to rebuild, and all actions, &c. should be referred to arbitrator:

the before-mentioned question, whether the said [A. B.] is liable to the said [C. D.], to rebuild the said premises; and all actions, suits, causes of action and suit, controversies, disputes, doubts, and questions whatsoever, between the said parties, concerning the re-building the said messuage, buildings, ground and premises, should be, and the same were by the said respective deeds poll, referred and submitted to the award, judgment, and final determination

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to have acceded to the terms of the former tenancy, as far as they are applicable to their new situation.

tenant of a warehouse, &c. the defendant undertook to repair; and averring, that defendant had continued his tenant, assigned as a breach that he had suffered the premises to remain out of repair. On the trial before Lord Ellenborough, it was insisted for the defendant, that a new holding had been created, without reference to the former lease. But his lordship was of opinion, that where a tenant holds over, he impliedly holds over subject to all the covenants in the lease, which are applicable to his new situation; and that the mere advance of rent made no difference. *Digby* v. *Atkinson*, 4 Camp. 275. And where there is besides a covenant to repair, a covenant by the lessee to insure the premises from fire, for a certain sum, and the premises are burnt, the lessee's liability to rebuild is not limited to the amount of the sum for which he covenanted to insure. *Ibid.*

A covenant that the tenant shall insure in a certain sum, does not limit his responsibility to that sum, under a general covenant to repair.

On account of the lessee's liability to rebuild, on a general covenant to repair, accidents by fire and tempest are sometimes excepted: But even then, if the lessee covenant to pay the rent, he will be liable to pay it, notwithstanding the ruinous condition of the premises, and although the lessor being liable to repair them, should have neglected to rebuild.

It was this liability of the tenant to rebuild, notwithstanding the house should be burnt down by accident, or blown down by tempest, that in all probability occasioned an exception, now frequently introduced in leases, of casualties by fire, and sometimes by wind and tempest. But even then, the lessee is bound to pay the rent during the term, although the house should be burnt or blown down, if there be an express covenant for payment of the rent, for the same reason and upon the same principles that he is bound to repair; namely, because he has bound himself by an express covenant to pay the rent. And as it appears by the before-mentioned case of *Paradine* v. *Jane*, Al. 26, that it is no plea in such case to an action of covenant for non-payment of the rent, to say, that the house was destroyed by the king's enemies, or that the defendant was evicted and turned out of possession by them; so it is equally no answer to say, that the house was burnt or blown down, and that therefore he is not bound to pay the rent. Thus in covenant for non-payment of rent reserved by a lease, in which the lessee covenanted to pay the rent, and also to repair, except the premises should be demolished or damaged by fire, the defendant pleaded, that

and decision of me, the said [*arbitrator*]: *And* that the said parties respectively, and their respective executors, administrators, and assigns, and all persons claiming under them respectively, should and would well and truly in all things obey, perform and abide by, fulfil, and keep the award, order, judgment, and final determination of me the said [*arbitrator*], touching or concerning the premises; *provided* I the said [*arbitrator*], should make my award in

TENANT TO REBUILD HOUSE DESTROYED BY FIRE.

and that the parties would abide his award.

provided it were made on

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before the rent became due, the premises were burnt down against his will, and that they were not rebuilt by the plaintiff during the whole time for which the rent was demanded, nor had he any enjoyment of the premises; but on demurrer, the plea was held ill, on the authority of the last cited case in Aleyn, 27; for that whatever might be the default of the plaintiff in not repairing, yet the defendant must, in all events, perform his covenant to pay the rent. *Monk* v. *Cooper*, 2 Ld. Raym. 1477; 2 Str. 763, S. C.; and expressly the same point was afterwards determined, on the authority of the last cited case, in *Belfour* v. *Weston*, 1 Durnf. and East, 310, S. C. cited, *ibid*, 710. Therefore it appears, that though the premises be consumed by fire, the lessee will be liable, under an express covenant to pay rent for them, notwithstanding their ruinous condition; although the lessor, being liable to repair them, should have neglected to rebuild. *Monk* v. *Cooper*; *Pindar* v. *Ainsley*; *Belfour* v. *Weston*, *ubi supra*. *Hare* v. *Groves*, Anst. 687. [Nor can uncertain damages to be recovered of the landlord for breach of any covenant, be set off against the landlord's demand of rent, *Monk* v. *Cooper*, *ubi supra*; *Weigall* v. *Waters*, 6 Durn. & E. 488.] And where the premises have been consumed by fire, and the landlord, having insured them, has recovered the insurance money, the tenant cannot compel him to rebuild; for the houses being insured by the landlord, is nothing to the tenant. *Pindar* v. *Ainsley*, cited 1 Durnf. and East, 312. And it seems that the lessor is not bound to rebuild, though he may insist on the payment of the rent during the whole term. *Pindar* v. *Ainsley*, cited 1 Durnf. and East, 312. *Weigall* v. *Waters*, 6 Durnf. and East, 488. In the case of *Monk* v. *Cooper*, it does not appear that there was any express covenant by the landlord to rebuild in case of fire, though it seems to have been taken for granted that he was bound to do so, because the lessee's covenant to repair contained an exception against fire. But in *Weigall* v. *Waters*, 6 Durnf. and East, 488, where in the lessee's covenant to repair, an exception was inserted against fire and tempest, and there was no express covenant for the landlord to repair

The lessor is not bound to rebuild, though he may insist on payment of the rent.

TENANT TO REBUILD HOUSE DESTROYED BY FIRE.

or before a given day, or within an enlarged time, not exceeding two months.

writing, under my hand, ready to be delivered to the said parties, their respective executors or administrators, or such of them as should request the same, on or before the 23d day of January then next ensuing, or within such enlarged period of time, not exceeding two months, as I the said [*arbitrator*] should think proper to fix, by any writing under my hand; *as* by the said deeds poll, reference being thereto respectively had, will (amongst other

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in either of these cases, Lord Kenyon doubted whether the lessee was liable; and that he would not be liable, appears to have been expressly decided in the court of Chancery. *Steele* v. *Wright*, before Lord Apsley, cited 1 Durnf. and East, 708. On another occasion, where the doctrine of the lessee's liability, notwithstanding the destruction of the house, was alluded to, Lord Kenyon observed, "that it must be taken with some qualification; for where an action was brought for rent after the house was burnt down, and the tenant applied to the court of Chancery for an injunction, Lord Northington said, that if the tenant would give up his lease, he should not be bound to pay the rent." *Cutter* v. *Powell*, 6 Durnf. and East, 323. In more than one case in Chancery, where the lessee has covenanted to repair, accidents by fire excepted, and the house having been burnt, the lessor, being insured, and *having received the insurance money*, has neglected to rebuild, an injunction has been granted against an action at law by the lessor for the rent, till the house should be rebuilt. *Camden* v. *Morton*, 2 Eden, 219; Selw. N. P. 436, 4th ed. S. C. *Brown* v. *Quilter*, 2 Eden, 219; Ambl. 619, S. C. *Steele* v. *Wakeford*, 1 Durnf. and East, 708. But these cases have been overruled by *Hare* v. *Groves*, Anstr. 687, and *Holtzapffel* v. *Baker*, 18 Ves. 115. [4 Taunt. 45.] Comyn on Landlord and Tenant, 193. The point in which the former determinations differ from these subsequent decisions, is the circumstance, that in all of them the landlord had insured, and received the insurance money; and therefore had the value of the thing, which was the subject of the contract with the lessee. As to him, therefore, no loss had happened. Accordingly, the Lord Chief Baron, in *Hare* v. *Groves*, suggested, that there "might be some equity to say, that he should not keep the house, or its value, and receive the rent also, but should either put the value down again, for the use of the lessee, or remit the rent." It is difficult, however, to conceive, as was observed in the last of these cases, (18 Ves. 118,) how that distinct contract, merely for the advantage of the lessor, with which the lessee has no concern, can affect the right as between

things) more fully appear. AND WHEREAS I the said [*arbitrator*], being unable to make my award on or before the said 23d day of January, I the said [*arbitrator*] did on the 22d day of January now last past, duly enlarge the time for making my award in pursuance of the terms of the said respective deeds poll, until the 14th day of March then next, inclusive (*b*). NOW KNOW YE, that I the said [*arbitrator*], having taken upon myself the burthen of the said

TENANT TO REBUILD HOUSE DESTROYED BY FIRE.

Recital of arbitrator having enlarged the time for making his award.

Testatum.

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them. 2 Eden, 220. For, as the lessee could not compel the lessor to make the insurance, it seems necessarily to follow, that he cannot demand any benefit from it. [In *Leeds* v. *Cheetham*, 1 Sim. 146, it has lately been decided, that if the lessor has insured, the lessee cannot compel him to lay out the value of the damages received at the insurance office in reinstating the buildings, or restrain him from recovering rent. The construction of covenants is the same in equity as in law, *Maxwell* v. *Ward*, 1 M'Clell. and Yo. 458. So that the decisions on this subject of the courts of law and equity are now uniform, and the doctrine may be considered as settled. And see further, Vol. IV. 421, 426, 490. *Ed.*]

As the lessee becomes liable under an express covenant to pay the rent, notwithstanding the premises are rendered useless by fire; and as the exception of fire and accident in the tenant's covenant to repair, will not bind the lessor to repair, it is sometimes stipulated that the rent shall be suspended or abated, in case of fire or tempest, and that the lessor shall, in such event, rebuild the premises. See the Form, in an agreement for a lease, *ante*, Vol. I. 12, 13.

It is sometimes stipulated, that the rent shall be suspended or abated, in case of fire, and that the landlord shall rebuild.

Lord Coke treats it as clear, that tenants by the curtesy, as well as tenants in dower, were punishable for waste at common law. 2 Inst. 299, 300. See also to the same effect Doct. and Student, 102, 113. Noy's Tenures, 11, 40. However, in 2 Inst. 145, Lord Coke says, the writ of waste against tenant by the curtesy is by statute. See 2 Inst. 301. But the preponderance of authority seems against the latter proposition. See 7 Gwill. Bac. Abr. 264, *Waste* (H.) If then tenant by the curtesy, and tenant in dower, were, by the common law, responsible for accidental fire, it may some time or other become necessary to determine whether they are within the statute of Queen Anne. The statute in expression is very *general*, the words being, that no action shall be prosecuted against *any person* in whose

Tenants by the curtesy and dower, seem not to be answerable for accidental fires.

(*b*) "Until" is, of itself, for this purpose inclusive. *Vide ante*, Vol. II. 632, (*c*).

"Until."

TENANT TO REBUILD HOUSE DESTROYED BY FIRE

reference, and having examined and duly considered the allegations and proofs of the said parties respectively, *do* make and publish this my award in writing, of and concerning the matters to me referred, as follows; that is to say; I do award and adjudge, that the said [A. B.] was and is liable (*c*) to the said [C. D.] to rebuild the said messuage, or dwelling-house, and other buildings, at the expense and costs of him the said [A. B.]. IN WITNESS, &c.

Award that tenant is liable to rebuild.

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house any fire shall *accidentally* begin, and it seems calculated to take away all actions in cases of accidental fire, as well from *other* persons, as from *landlords*. Hargr. n. Co. Litt. 57, a. (1); and see Earl of *Chesterfield* v. Duke of *Bolton*, Com. Rep. 629.

Tenants by statute merchant or staple, are not punishable for waste.

The distinction which is taken as to waste at common law, between tenants coming in by *act of law*, and tenants whose estates accrue by *act or agreement of parties*, will not universally hold; for tenants by statute merchant and statute staple, though they come in by *process of law*, are not punishable for waste. 6 Co. 37, b. Mr. Hargrave says, "perhaps the reason of this may be, that it is in the power of debtors, to prevent the commencement of these estates, or to determine them, by paying the debts for which creditors have such estates; and also that the tenants of such estates are accountable for all profits they make beyond the amount of the debts due to them." Hargr. n. Co. Litt. 57, a. (1), *ad finem*. But the reason appears to be, that because they are not tenants for life or years, they are therefore out of the statute of Gloucester, 6 Co. 37, b. 2 Inst. 302.

(*c*) As to the submission of a question at law to an arbitrator, *vide post*, 17th AWARD, note (*b*). [77.]

AWARD *of the Right of* PRESENTATION *to an* ADVOWSON (*a*).

RIGHT OF PRESENTATION.

THAT the advowson, and right of presentation of, in, and to the said vicarage of [H.], are vested in, and belong to the sub-dean of [A.], and his successors, and the said [F. A.], and her heirs: AND that the said sub-dean, and his successors, and the said [F. A.], and her heirs, are entitled to present to the said vicarage by turns: AND that the said dean and chapter of the cathedral church of [A.], have not any right or title to the advowson of the said vicarage, or of any part thereof, nor any right or title to present thereto.

That an advowson is vested in two:

that they are entitled to present by turns:

and that a dean and chapter have no right thereto.

(*a*) Where an arbitrator, to whom the question of the right of two rectors to the tithe of certain lands, was referred, had power to devise all means to prevent future litigation between the parties, and to settle all matters in difference between them, and to determine what he should think fit to be done by either of the parties, touching the matters in dispute, it was held that he did not exceed his power, by awarding undivided moieties of the tithes to the two rectors. *Prosser v. Goringe*, 3 Taunt. 426.

An arbitrator may award undivided moieties of tithes to two rectors.

BY TWO ARBITRATORS, OF RECONVEYANCE AND GENERAL RELEASE TO MORTGAGOR.

AWARD *of two Arbitrators, under Cross* BONDS *of Submission, on a general Reference by a Mortgagor and Mortgagee, that the Mortgagor shall pay to the Mortgagee a certain Sum in full of all Demands on Mortgages and other Securities, and of all Costs to the day of Submission: on Payment of the Money awarded, the Estates mortgaged to be reconveyed; and the Deeds relating thereto to be delivered to the Mortgagor: the Mortgagor to be let into Possession of the mortgaged Estates on the Day of Payment, and to receive the Arrears of Rent: the Mortgagor to pay the Costs of Actions and Suits between him and the Mortgagee previous to the Submission: and on Payment of the Sum awarded, the Mortgagee to give the Mortgagor a* GENERAL RELEASE.

Exordium.

TO ALL TO WHOM THIS PRESENT WRITING OF AWARD SHALL COME [*two arbitrators*], of, &c. *send Greeting*.

Recital of cross bonds of submission by mortgagor and mortgagee.

WHEREAS [*mortgagor*] of, &c., gentleman, and [*mortgagee*] of, &c., widow, have respectively bound themselves each to the other, in the penal sum of (one thousand) pounds, by their several bonds or obligations, bearing date on or about the (twenty-first) day of (March) now last past; *With* conditions thereunder written, to obey, perform, fulfil, keep, and abide by the award, order, arbitrament, final end, and determination of the said [*two arbitrators*], arbitrators indifferently named, elected, and chosen, as well on the part and behalf of the said [*mortgagor*] as [*mortgagee*], to arbitrate, award, judge, and determine of and concerning all and all manner of titles, mortgages, securities, action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, exe-

BY TWO ARBITRATORS, OF RECONVEYANCE AND GENERAL RELEASE TO MORTGAGOR.

cutions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time thentofore had, made, moved, brought, commenced, sued, prosecuted, suffered, continued, or depending by and between the said parties, or either of them; *So as* the said award should be made in writing, under the respective hands and seals of us the said arbitrators, and ready to be delivered (*a*) to the parties in difference, or such of them as should desire the same, on or before the twenty-ninth day of the present month of September: [*As* by the said recited bonds or obligations, and the conditions thereof, reference being thereunto had, will more fully and at large appear.] Now KNOW YE, that we the said [*arbitrators*], having taken upon ourselves the charge and burthen of the said award, and having heard the said parties and their attornies, and having heard and examined their respective witnesses, and duly weighed and considered all their allegations, and the grievances on both sides; and having taken all the matters in difference submitted to our award as aforesaid, *Do* order and award, *That* the said [*mortgagor*], his heirs, executors, or administrators, shall pay, or cause to be paid unto the said [*mortgagee*], her executors, administrators, or assigns, the sum of one hundred pounds, on the (third) day of (December) now next, at the office of [*attorney*], solicitor, at in the said county of , between the hours of ten and twelve in the forenoon of the same day, in full of all her demands (down to the said twenty-first day of March now last past, being the day of the date of the said recited bonds or obligations); not only on account of all principal money and interest due to her, for or in respect of any mortgages, bonds, notes, or other securities whatsoever, at any time theretofore made, given, or otherwise executed by or between the said [*mortgagor*] and [*mortgagee*], or either of them, of or concerning any leasehold messuages, cottages, dwelling-houses, tenements, closes, and hereditaments, situate, standing, lying, and being in aforesaid, or elsewhere in the said county of ; and which are mentioned and comprised in a certain indenture of lease or demise, bearing date on or

Testatum.

Award, that mortgagor shall pay mortgagee a sum in full of all demands on mortgages, and other securities, and of all costs to the day of submission.

(*a*) *Vide ante*, Vol. II. 583, (*b*); *ante*, 2, (*b*).

BY TWO ARBITRATORS, OF RECONVEYANCE AND GENERAL RELEASE TO MORTGAGOR.

about the day of , 18 , and made and executed by [*lessor*] of, &c. unto the said [*mortgagor*] ; but also in satisfaction and discharge of and for all costs, charges, and expenses whatsoever that have accrued or happened to or unto her the said [*mortgagee*], touching or concerning any such mortgages, securities, suit or suits, action or actions, or other cause, matter, or thing whatsoever, at any time before the said twenty-first day of May now last past, depending between the said [*mortgagor*] and [*mortgagee*]. And we do hereby further award, order, and declare, that on payment of the said sum of one hundred pounds by the said [*mortgagor*] to the said [*mortgagee*], her executors, administrators, or assigns, on the day, and at the time and place aforesaid, she the said [*mortgagee*] shall and do, at the expense of the said [*mortgagor*], his heirs, executors, administrators, or assigns, not only seal and deliver unto the said [*mortgagor*], his, heirs, executors, or administrators, a good and effectual deed of assignment, of *All those* two messuages, &c. situate, lying, and being in aforesaid; *and also* of all those several closes of land, &c.; or to any person or persons he or they may appoint, for and during all the rest, residue, and remainder of the term and terms of years, and other her estate and interest therein and thereunto; *but also* shall and do, on the day and at the time and place aforesaid, deliver, or cause to be delivered unto the said [*mortgagor*], his heirs, executors, administrators, or assigns, all deeds, evidences, and writings whatsoever in her custody, power, or possession, or in the custody, power, or possession of any other person or persons whomsoever, and which she can obtain or come at without suit at law or in equity, which relate to or concern the said leasehold messuages, closes of land, and premises, or any part or parcel thereof. And the said [*arbitrators*] do hereby further order and award, *That* the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall be let into the quiet and peaceable possession (*b*) of *All* and singular the said leasehold premises so hereby awarded to be assigned by the said [*mortgagee*] to the said

on payment of money awarded, the estates mortgaged to be reconveyed;

and the deeds relating thereto to be delivered to mortgagor:

mortgagor to be let into possession of the mortgaged estates on the day of payment;

(*b*) *Vide ante*, Vol. II. 639.

BY TWO ARBITRATORS, OF RECONVEYANCE AND GENERAL RELEASE TO MORTGAGOR.

[*mortgagor*], his heirs, executors, administrators, or assigns, as aforesaid, on the said (third) day of (December) now next: *And* that he the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall be entitled unto, and have, receive, and take all arrears of rent of the said premises so intended to be assigned by the said [*mortgagee*], her executors or administrators, unto the said [*mortgagor*], his heirs, executors, administrators, or assigns as aforesaid, as now is, and shall be on the said (third) day of (December) next, in the hands of the present tenant thereof. AND we the said [*arbitrators*] do hereby also order and award, *That* the said [*mortgagor*], his heirs, executors, or administrators, shall and do pay, or cause to be said, all such costs, charges, and expenses as at any time before the said (twenty-first) day of (March) now last past, have happened, or been occasioned by or by reason or means, or upon account of any suit or suits, action or actions, either at law or in equity, depending by or between them the said [*mortgagor*] and [*mortgagee*]. AND we the said [*arbitrators*] do hereby further order and award, *That* she the said [*mortgagee*] shall, upon receiving the said sum of (one hundred) pounds, execute unto the said [*mortgagor*], his heirs, executors, and administrators, a good and sufficient release of all and all manner of action and actions, cause and causes of action, bills, bonds, writings and obligations, notes, acknowledgments, powers, provisoes, dues, duties, reckonings, accounts, sum and sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, for or by reason or means of any matter, cause, or thing whatsoever, both at law or in equity, or otherwise howsoever, which against the said [*mortgagor*], she the said [*mortgagee*], ever had, or now hath, or which she the said [*mortgagee*], her heirs, executors, or administators, shall or may have, claim, challenge, or demand, for or by reason or means of any act, cause, or thing whatsoever, from the beginning of the world to the said (twenty-first) day of (March) now last past, being the day of the date of the said bonds of arbitration. IN WITNESS whereof we the said [*arbitrators*], the said arbitrators,

and to receive arrears of rent.

Mortgagor to pay costs of actions and suits between him and mortgagee previous to submission:

and on payment of sum awarded, mortgagee to give mortgagor a general release.

Testimonium.

have hereunto severally set our hands and seals, the day of , 18 .

Attestation. SIGNED, SEALED, AND PUBLISHED, by the said [*arbitrators*], as their award, (being first duly stamped (*d*), in the presence of us,

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Stamp. (*d*) *Vide ante*, 4, (*d*).

OF UMPIRE, ON GENERAL REFERENCE BY MORTGAGOR AND MORTGAGEE IN POSSESSION.

AWARD *of an* UMPIRE *appointed by two Arbitrators, on a Reference under* CROSS BONDS, *given by a* MORTGAGOR AND *a* MORTGAGEE *in Possession, concerning the Rents, Profits, and Expenses of the Lands mortgaged, and various other Matters of Account, being also* A GENERAL REFERENCE, *That Proceedings in a Chancery Suit shall cease: that after giving Credit for Crops, certain Sums are due to the Mortgagee, on account of the Mortgage and mortgaged Estate: that further Monies are due to the Mortgagee, on a General Account; exclusively of* 127*l.* *the value of several Articles for which the Mortgagor has been given Credit, and of* 107*l.*, *the Value of a Quantity of Dung, for which the Mortgagee has not been given Credit: the Mortgagee to spread the Dung; and if the Mortgagor should, on a certain Day, pay the Mortgagee such Money, as on a fair Account shall appear to be due, and the* 127*l.* *and* 107*l.*, *and Interest on the* 107*l.*; *or should jointly with Two responsible Persons, give a Bond to the Mortgagee for Payment of the* 127*l.* *and* 107*l.*, *with Interest*

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on the 107*l.*; *and should also, jointly with the Two responsible Persons, execute a Warrant of Attorney, to confess Judgment for the Penalty of the Bond, with a Defeazance, to be void on Payment of the* 127*l.* *and* 107*l.* *and Interest on the* 107*l.* *from the Date thereof, then the Mortgagee to deliver to the Mortgagor Possession of the Farm, &c.: one Side of the Account between the Mortgagor and Mortgagee to contain certain Particulars, and the other Side to contain other Particulars; but the Mortgagor not to be charged with certain Expenses, nor have Credit for the Produce, but to be allowed a Rent: the Two Sureties to be approved by the Arbitrators or Umpire: the Mortgagor to give the Mortgagee Notice of his Intention to redeem, with the Names of the intended Sureties, if he should propose to give Security, instead of paying the Money: if the Mortgagor should not so redeem, he to be for ever foreclosed; and the Mortgagee to become absolute Owner of the Farm, and the several Articles; and in such Case, the Mortgagee to take the Farm in full for Mortgage Money, and Interest; and the several Articles in full for the* 127*l.*: *the Mortgagor, within Two Days, to give a Warrant of Attorney to confess Judgment to the Mortgagee, with a Defeazance for Payment of* 100*l.* *on a given Day, and* 50*l.* *half yearly, until the Balance of the General Account be paid: but the Mortgagee to be at liberty to sue out Execution for the whole Sum on Default of any one Payment: the Mortgagee to pay* 10*l.* *towards the Tavern Expenses of the Arbitration; and the Mortgagor to pay the Residue: the Mortgagee forthwith to give the Mortgagor a* GENERAL RELEASE *of all Actions, &c. except the Warrant of Attorney awarded to be given by him: and the Mortgagor to give a similar Release*

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to the Mortgagee; with the Exception of his Right to Redeem on the Terms awarded.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I [*umpire*], esquire, of, &c. barrister at law, *send Greeting*. (*a*) WHEREAS [*mortgagor*], late of, &c. in the parish of , in the county of , but now of in the said county, gentleman, being possessed of a certain farm, situate in the neighbourhood of , in the county of , by virtue of a certain indenture of lease, thereof to him granted by [*lessor*], esquire, for a certain term of years therein mentioned, and being indebted to [*mortgagee*], of , in the said county of , mercer, *did* by a certain indenture of mortgage, bearing date on or about the day of , 18 , and made between the said [*mortgagor*], of the one part, and the said [*mortgagee*], of the other part, convey to the said [*mortgagee*], the said indenture of lease, and the premises thereby demised, to secure to the said [*mortgagee*] the payment of the sum of (five hundred) pounds, with lawful interest, from the day of the date of the said indenture of mortgage: *And* in which said indenture of mortgage, there is contained a proviso for redemption of the said indenture of lease, and the premises thereby demised, on the payment by the said [*mortgagor*], his executors, administrators, or assigns, to the said [*mortgagee*], his executors, administrators, or assigns, of the sum of (five hundred) pounds, with lawful interest, on the day of , 18 . AND WHEREAS neither the sum of (five hundred) pounds, nor any part thereof, nor any interest thereon, was paid on the said day of , 18 ; whereby the said mortgage became absolute at law: *And* the said [*mortgagee*] took possession of the said farm, on or about the day of , 18 ; and hath ever since continued in possession thereof, and in receipt of the profits and proceeds thereof. AND WHEREAS various other transactions and matters of account have, for several years past, taken place between the said parties; and the said [*mortgagor*] hath lately filed a bill in the High Court of Chancery against the said [*mortgagee*]; and di-

Recital of a mortgage of a leasehold estate.

Recital that neither principal nor interest were paid on the day appointed; and that mortgagee is in possession.

Recital of various other matters of account; a bill in Chancery by mortgagor against mortgagee; and disputes between the parties:

(*a*) This award was made under a general reference, without any recitals, *ut ante*, Vol. II. 595.

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vers disputes, animosities, and contentions have taken place between the said parties: *For* appeasing, pacifying, ordering, and determining whereof, the said [*mortgagee*] and [*mortgagor*] have submitted themselves, and are become bound each to the other, by their several obligations, bearing date on or about the day of last past, in the penal sum of (one thousand) pounds of good and lawful money of Great Britain [and Ireland]; *With conditions* thereunder written, to stand to, obey, abide by, perform, fulfil, and keep the award of [*arbitrator*] of, &c. gentleman, and [*other arbitrator*], of &c. gentleman, arbitrators, indifferently chosen, as well on the part and behalf of the said [*mortgagee*], as of the said [*mortgagor*], to arbitrate, award, order, judge, and determine of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time or times heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties, or either of them; *So as* the said award were made in writing, under the hands and seals of them the said [*two arbitrators*], on or before the day of then next ensuing; *But* if they the said [*two arbitrators*] should not make such their award on or before the said day of , *Then* that they the said parties should stand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, umpirage, final end and determination of such person as the said arbitrators should appoint as an umpire between them, in and concerning the premises; *So as* the said umpire should make his award or umpirage of and concerning the premises, on or before the day of then next ensuing. *And whereas* the said [*two arbitrators*] did, by a note in writing under their hands, bearing date the day of , 18 , written under the condition annexed to the said bonds, appoint (*b*) me the said [*umpire*], to be the umpire between them. AND WHEREAS the said [*two arbitrators*] did not make any award (*c*) of and con-

For determining whereof, they have given cross bonds; with conditions to perform the award of two arbitrators,

on a general reference;

so as their award be made by a given time:

and in default thereof,

then to perform the award of an umpire, to be appointed by the arbitrators;

so as his award be made on a given day.

Recital of appointment of umpire by two arbitrators.

Recital that arbitrators made no award before the expiration of their time.

(*b*) As to the appointment of an umpire, *vide ante*, Vol. II. 587—8.

(*c*) *Vide ante*, Vol. II. 591.

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Testatum.

Award by an umpire,

that proceedings in a Chancery suit shall cease:

that after giving credit for crops, certain sums are due to mortgagee on account of mortgage and mortgaged estate:

that further monies are due to mortgagee on a general account;

exclusively of 127*l.*, the value of several articles for which the mortgagor has been given credit;

and of 107*l.*, the value of a quantity of

cerning the premises on or before the said day of . Now know ye, that I the said [*umpire*], appointed umpire as aforesaid, having taken upon myself the charge of the said umpirage, and having deliberately and at large heard, examined, and considered the allegations, witnesses, and evidences of both the said parties concerning the premises, *do* thereupon make this my umpirage and final determination in writing, between the said parties, of and concerning the premises, in manner and form following; that is to say; *That* all proceedings on the said bill in Chancery shall cease, and be henceforth considered as null and void, as if the said bill had been dismissed by an order of the said court. And I do hereby adjudge, that after giving the said [*mortgagor*] credit for the produce of the crops of hay and beans now remaining undisposed of on the said farm, and for the value of the after grass, up to the day of last, there remained due to the said [*mortgagee*], from the said [*mortgagor*], on the said day of , on the said mortgage, the sum of (two hundred and seventy-two) pounds (sixteen) shillings and (six) pence; exclusively of the two several sums of (one hundred and three) pounds (twelve) shillings and (six) pence, for the rent of the said farm; and (thirteen) pounds (four) shillings for tithes, both due on the day of last, but which were not paid by the said [*mortgagee*] on or before the said day of . And I do hereby further adjudge, that the said [*mortgagor*] was, on the said day of , further indebted to the said [*mortgagee*], in the sum of (seven hundred and sixteen) pounds (fifteen) shillings and (eight) pence, on a general account, independently of the said mortgage, and exclusively of the sum of (one hundred and twenty-seven) pounds, being the estimated value of the several articles mentioned in a certain inventory, signed by the said [*mortgagee*], and now in the possession of the said [*mortgagor*], which several articles were left by the said [*mortgagor*] on the said farm when he quitted the possession thereof; for which I have given the said [*mortgagor*] credit, in taking the said general account; and also exclusively of the sum of (one hundred and seven) pounds, being the estimated value of a large

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quantity of dung, now lying on the said farm, but not spread thereon; and for which I have not given the said [*mortgagee*] credit in stating the account between the said parties, relative either to the said mortgage, or to the said general account. AND I do hereby award, that the said [*mortgagee*] shall forthwith cause the said quantity of dung to be spread on the said farm; and if the said [*mortgagor*] should, on the day of now next ensuing the date of these presents, or at any time before that day, pay to the said [*mortgagee*] such sum of money, as on a fair account to be taken between them, shall appear to be due to the said [*mortgagee*] on the said mortgage; and should either pay to the said [*mortgagee*], the said sums of (one hundred and twenty-seven) pounds, and (one hundred and seven) pounds, with interest on the latter sum from the said day of : *or* should, jointly with two responsible persons (*d*), to be approved of as hereafter mentioned, enter into a bond to the said [*mortgagee*], in the penal sum of

dung, for which mortgagee has not been given credit: mortgagee to spread the dung; and if mortgagor should, on a certain day, pay mortgagee such money as on a fair account shall appear to be due, and the 127*l.* and 107*l.*, and interest on the 107*l.*; or should jointly, with two responsible

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(*d*) At first sight this might appear objectionable. For if the award had been, that the mortgagee should be bound with sureties for payment of the money, the award as to the sureties would have been void; but as such an award is only void for the excess, the mortgagee himself must, in such a case, have become bound. 1 Roll. Abr. 259, pl. 7. 3 Vin. Abr. 35. *Coke* v. *Whorwood*, 2 Lev. 6. 2 Saund. 337, S. C. Where the arbitrator awarded that the defendant should pay to the plaintiff, on a certain day, 100*l.*, or should find two sufficient sureties, to be bound with him to the plaintiff, to pay the 100*l.* to the plaintiff by 20*l.* a year, until the whole sum be paid; "the Court was clearly of opinion, that although the award be set down and conceived in words disjunctive, yet, in law and in substance, it is single: for as to the finding of sureties the award is void, and so nothing is awarded but the payment of the one hundred pounds at the day." *Oldfield* v. *Wielmers*, 1 Leon. 140. But the reader will observe a distinction between both of these cases and the above. For in the above case the mortgagee is to deliver the possession of the farm to the mortgagor, if he should perform the condition precedent, of either paying the money, or procuring sureties for the payment. To such an award there does not appear to be any objection.

An award, requiring strangers to the submission to join as sureties for payment of the money awarded, is void as to the strangers.

But it is otherwise where sureties are required to join with a party, as a condition precedent to something being done by another party.

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(four hundred and sixty-eight) pounds, with a condition to be void on the payment of the said several sums of (one hundred and twenty-seven) pounds and (one hundred and seven) pounds to the said [*mortgagee*], within six calendar months from the day of the date of such bond; together with interest on the said sum of (one hundred and seven) pounds from the said day of : And should also jointly with the said two responsible persons, execute a warrant of attorney to the said [*mortgagee*], of even date with the said bond, authorising him to enter up judgment against them, in his Majesty's Court of King's Bench, for the said sum of (four hundred and sixty-eight) pounds; with a defeazance annexed to the said warrant of attorney, that it shall be void on payment to the [*mortgagee*] of the said sums of (one hundred and twenty-seven) pounds and (one hundred and seven) pounds, with interest on the latter sum as aforesaid, within six calendar months from the day of the date thereof, *Then* he the said [*mortgagee*] shall deliver to the said [*mortgagor*] the possession of the said farm, and the several articles specified in the inventory hereinbefore mentioned. And I do hereby further award and direct, that on the one side of the said account shall be stated, as well the said sum of (two hundred and seventy-two) pounds (sixteen) shillings and (six) pence, together with interest thereon, from the said day of , to the day of the taking the said account, as all rent, tithes, taxes, and other reasonable and proper charges and expenses, including the expenses of spreading the said dung on the said farm, paid, disbursed, and incurred by the said [*mortgagee*] on account of the said farm; and on the other side of the said account shall be stated the profits and proceeds of the said farm, received or enjoyed by the said [*mortgagee*] from the said day of , to the day of settling the said account; but the said [*mortgagor*] shall not, in any shape, be charged with the expenses of carrying the produce of the said crop now remaining on the said farm undisposed of; nor shall he be charged with any expenses accrued on account of the garden and orchard, adjoining to the house on the said farm; nor have any credit given him on account of the produce of the said garden and orchard,

persons, give a bond to mortgagee, for payment of the 127*l.* and 107*l.*, with interest on the 107*l.*; and should also, jointly with the two responsible persons, execute a warrant of attorney to confess judgment for the penalty of the bond, with a defeazance, to be void on payment of the 127*l.* and 107*l.*, and interest on the 107*l.* from the date thereof, then mortgagee to deliver to mortgagor possession of farm, &c.

one side of the account between mortgagor and mortgagee to contain certain particulars,

and the other side to contain other particulars;

but the mortgagor not to be charged with certain expenses,

nor have credit for the produce,

but shall be allowed in the said account, at the rate of (fifteen) pounds by the year, in the name of rent for the said house, garden, and orchard, from the said day of to the time of settling the said account: *Provided*, that the said two persons, to be offered by the said [*mortgagor*] as sureties for the payment of the said sum of (two hundred and thirty-four) pounds, be approved by the said [*arbitrators*]; or in case they should not agree in the course of one week, from the time when the names of the said persons proposed as sureties shall be given in by the said [*mortgagor*] to the said [*mortgagee*], then to be approved by me the said [*umpire*]: *And provided also*, that the said [*mortgagor*] shall give to the said [*mortgagee*] six weeks notice in writing of his intention to redeem the said mortgage; together with the names of the two persons he shall propose as sureties for the payment of the said several sums of (one hundred and twenty-seven) pounds, and (one hundred and seven) pounds, with interest on the latter sum as aforesaid, if he should propose to give such security, instead of paying the said sums. AND I do hereby further award and determine, that if the said [*mortgagor*] should not, in manner aforesaid, redeem the said mortgaged premises on or before the said day of now next ensuing, then he shall be for ever foreclosed of all equity of redemption thereof; and the said [*mortgagee*] shall become absolute owner of the said farm, and of the said indenture of lease, and of the said several articles contained in the inventory hereinbefore mentioned, fully, freely, and clearly discharged of all claim or demand of the said [*mortgagor*], and of all and every persons and person claiming by or through him, or in his right; and that in such case the said [*mortgagee*] shall take the said farm and indenture of lease, in full satisfaction for the said sum of (five hundred) pounds, secured by the said mortgage, and all interest thereon; and shall take the said several articles contained in the said inventory, as a full and complete satisfaction and discharge to the said [*mortgagor*] for the said sum of (one hundred and twenty-seven) pounds, for which I have given him credit as aforesaid in the said general account: AND I do hereby further order and award, that the said [*mortgagor*]

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but to be allowed a rent: the two sureties to be approved by the arbitrators or umpire:

mortgagor to give mortgagee notice of his intention to redeem; with names of intended sureties, if he should propose to give security, instead of paying the money:

if mortgagor should not so redeem, he to be for ever foreclosed;

and mortgagee to become absolute owner of farm, and several articles;

and in such case mortgagee to take farm in full for mortgage money and interest, and the several articles in full for the 127*l.*:

mortgagor within two days to give a war-

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shall, within two days after the date of these presents, notice thereof being immediately given to him, execute to the said [*mortgagee*] a warrant of attorney, authorising the said [*mortgagee*] to enter up judgment against him for the sum of 1433*l.* 11*s.* 4*d.*, being double the amount of the said sum of 716*l.* 15*s.* 8*d.*, *With* a defeazance thereto annexed, that if the said [*mortgagor*] should pay to the said [*mortgagee*] the sum of (one hundred) pounds on or before the day of , 18 , and the sum of (fifty) pounds every six months afterwards; that is to say; on the day of , 18 , on the day of , 18 , and so on till the whole sum of (seven hundred and sixteen) pounds (fifteen) shillings and (eight) pence, shall be discharged, then the said warrant of attorney shall be void; *but* that the said [*mortgagee*] shall be at liberty to sue out execution on the said judgment for the whole sum of (seven hundred and sixteen) pounds (fifteen) shillings and (eight) pence, on default of any one payment as aforesaid, or for so much of the said sum as shall remain due and unpaid when such default shall be made: AND I do hereby further award, that the said [*mortgagee*] shall pay the sum of (ten) pounds towards the discharge of the bill of [*innkeeper*], for expenses incurred in the course of this arbitration at his house, called the Old Swan, in aforesaid; and that the said [*mortgagor*] shall pay to the said [*innkeeper*] the remainder of his said bill: AND I do hereby finally order and award, that the said [*mortgagee*] shall forthwith execute to the said [*mortgagor*] a general release (*e*) of all actions, cause and causes of action, judgments, suits, controversies, trespasses, debts, duties, damages, accounts, reckonings, and demands whatsoever, for or by reason of any matter, cause, or thing whatsoever, from the beginning of the world until the day of the date of the said bonds of arbitration; save and except the said warrant of attorney, hereinbefore awarded to be executed by the said [*mortgagor*] to the said [*mortgagee*]; *And* that the said [*mortgagor*] shall forthwith execute to the said [*mortgagee*] a similar release, with the exception

warrant of attorney to confess judgment to mortgagee, with defeazance for payment of 100*l.* on a given day, and 50*l.* half yearly, until the balance of the general account be paid;

but mortgagee to be at liberty to sue out execution for the whole sum, on default of any one payment:

mortgagee to pay 10*l.* towards tavern expenses of arbitration;

and mortgagor to pay the residue:

mortgagee forthwith to give mortgagor a general release of all actions, &c.

except warrant of attorney awarded to be given by him; and mortgagor to give a similar release to

(*e*) See the Releases in pursuance of this award, *post*, RELEASE, title AWARD.

only of his right to redeem the said mortgaged premises, on the terms and in the manner hereinbefore directed and appointed. IN WITNESS whereof, I the said [*umpire*] to both parts of this present award indented, have set my hand and seal, this day of , 18 .

mortgagee, with exception of his right to redeem on the terms awarded. Testimonium.

SIGNED, SEALED, AND DELIVERED, (being first duly stamped (*f*)), in the presence of

Attestation.

(*f*) *Vide ante*, 4, (*d*).

Stamp.

RESPECTING CLAIMS UNDER THREE WILLS.

AWARD *by* THREE ARBITRATORS, *on a Submission by several, respecting* CLAIMS UNDER THREE WILLS, *where the* TIME *for making the Award has been* ENLARGED BY THE PARTIES, *and where the Arbitrators find that T. T. bequeathed to J. T. the Interest of* 200*l. for Life; and after J. T's. Decease, bequeathed the Principal to his Children; and that T. T. devised and bequeathed the Residue of his Real and Personal Estates (subject to his Debts, &c.) to G. H., and appointed him Executor: that the Estate of T. T., which came to the hands of G. H., was sufficient to discharge T. T.'s Debts, &c.: that a Freehold House in the Possession of C. H. was part of T. T.'s Estate, and charged by him with Payment of his Debts, &c. and remains chargeable with the Bequest to J. T. and his Children: that T. H. as Executor of G. H., is entitled to* 100*l., on Mortgage of a Public House: and that all Demands of the Claimants under the Wills, have been fully discharged;* THAT *C. H. shall, within one Month, deliver to T. H. all Deeds and Writings in her Custody relating to the*

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Public House; and convey and deliver Possession of the Freehold Premises, and all Deeds and Writings relating thereto, to T. H.; that C. H. shall retain all the other Effects which have or may come to her Hands as Executrix of J. H. (except any Rents she may have received since his Death, on account of the Freehold Estate) in full satisfaction of all Claims under the three Wills: that T. H. shall, out of the Mortgage of the Public House, and out of the Freehold Premises, pay the Bequest to J. T. and his Children: that C. H. shall account for, and pay to T. H., within one Month, all Rents she has received on account of both Estates, since her Testator's Decease; that T. H. shall pay to C. H. all Interest she has paid to J. T. since the Decease of her Testator: that T. H. shall, within one Month, pay to C. H. 12*l.* 12*s. in full for all Expenses of Repairs: that C. H. shall execute to T. H. a Release of all Demands, under the three Wills; that C. H. shall, within one Calendar Month, deliver to T. H. all Writings respecting only the Estates T. T. and G. H.: that when C. H. shall have fully complied with the Award, T. H. shall execute to her a similar Release: that J. H. and J. M. and J. S., in Right of their Wives, shall execute similar Releases to T. H. and C. H.; that T. H. shall execute to C. H. a Bond in* 800*l.*, *to indemnify her against all Demands of J. T. and his Children, and all others claiming through them, or under the Wills of T. T. and G. H.; and that T. H. shall pay the Expenses of the Arbitration.*

Recital of cross bonds of submission from four to one, and from one to four;

TO ALL TO WHOM THESE PRESENTS SHALL COME. We [*three arbitrators*] of, &c. *send Greeting.* WHEREAS [J. H.], of , in the county of , cooper, [J. M.], of , in the said county of , bookseller, claiming in right of his wife [*Jane* M.], late [J. H.]

spinster; the reverend [J. S.], of , in the county of , clerk, claiming in right of his late wife [C. S.], formerly [C. H.], spinster, now deceased; and [C. H.], of aforesaid, spinster, by a certain bond or obligation, bearing date on or about the day of , 18 , became bound to [T. H.], of , in the said county of , yeoman, in the penal sum of one thousand pounds: *And* the said [T. H.], by another bond or obligation, bearing even date therewith, became bound to the said [J. H.], [J. M.], and [*Jane*] his wife, [J. S.] and [C. H.] in the like penal sum; *With conditions* written under the said several bonds, that they the said [J. H.], [J. M.], and [*Jane*] his wife, [J. S.] and [C. H.], and the said [T. H.] respectively, should stand to, obey, abide by, observe, perform, fulfil, and keep the award, order, arbitrament, final end, and determination of us the said [*three arbitrators*], arbitrators indifferently chosen, elected, and named, as well by and on the part and behalf of the said [J. H.], [J. M.], and [*Jane*] his wife, [J. S.] and [C. H.], as on the part and behalf of the said [T. H.], to arbitrate, award, judge, and finally determine concerning all and all manner of claim and claims which they, or any or either of them had, or pretended to have, by, from, or under the several wills of [T. T.], long since deceased, [G. H.], deceased, and [J. H.], also deceased, respectively. AND WHEREAS, by indorsement in writing on each of the said several bonds, under the hands and seals of the said [J. H.], [J. M.], and [*Jane*] his wife, [J. S.] and [C. H.], and of the said [T. H.], bearing date respectively on or about the day of , 18 , the time for us the said arbitrators, making our award in manner aforesaid was enlarged (*a*) until the eighth day of November then next ensuing. NOW KNOW YE (*b*), that *We* the said [*three arbitrators*], having taken upon ourselves the burthen of the said arbitration, and having heard, and duly and maturely

RESPECTING CLAIMS UNDER THREE WILLS.

with conditions to perform the award of three arbitrators concerning claims under three wills.

Recital of the parties having enlarged the time for making the award.

Testatum.

(*a*) As to the general doctrine respecting the enlargement of the time for making an award, *vide ante*, Vol. II. 631—7.

Enlargement of time.

(*b*) This award is made in pursuance of the submission, *ante*, Vol. II. 09.

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weighed and considered the several allegations, vouchers, and proofs brought before us, by and on behalf of the said parties in difference respectively, and having fully examined into their several alledged claims and interests under the several and respective wills of the said [T. T.], [G. M.], and [J. H.], deceased, *Do* find, that the said [T. T.], by his said will, among other specific legacies, gave and bequeathed to his nephew [J. T.], who is yet living, the yearly interest of two hundred pounds, at the rate of four pounds ten shillings for one hundred pounds for a year, for and during the term of his natural life: *And* that after the decease of the said [J. T.], the said testator gave and bequeathed the said principal sum of two hundred pounds unto and amongst all and every the child and children of his said nephew [J. T.] who should be living at the time of the decease of the said testator, to be equally divided between them, share and share alike: *And* that the said [T. T.], by his said will, gave, devised, and bequeathed all the rest and residue of his estate, both real and personal, (subject nevertheless to the payment of his debts, legacies, and funeral expenses, with which he charged as well his real as his personal estate) to the said [G. H.], his heirs, executors, and administrators, whom he appointed sole executor of his said will. And *We* the said [*three arbitrators*] do further find, that the estate of the said [T. T.], which came to the hands and possession of the said [G. H.], deceased, was fully sufficient to satisfy and discharge all the debts and legacies, and funeral expenses of the said [T. T.], and the expenses attending the execution of his said will: *And* that a certain freehold house, with a close of land adjoining, and thereto belonging, with the appurtenances, situate, lying, and being at , in the said county of , now in the possession or occupation of the said [C. H.], was part of the estate of the said [T. T.], and charged by him in and by his said will with the payment of his debts, legacies, and funeral expenses, as aforesaid; and remains subject to, and chargeable with, the bequest hereinbefore mentioned, to the said [J. T.] and his children: *And further*, that the said [T. H.], as surviving executor of the will of the said [G. H], is entitled to the sum of one hundred pounds secured by mortgage on a certain freehold

Arbitrators find that T. T. bequeathed to J. T. the interest of 200*l.* for life:

and after J. T.'s decease, bequeathed the principal to his children.

and that T. T. devised and bequeathed the residue of his real and personal estates (subject to his debts, &c.) to G. H., and appointed him executor:

that the estate of T. T., which came to the hands of G. H., was sufficient to discharge T. T.'s debts, &c.

that a freehold house in the possession of C. H. was part of T. T.'s estate, and charged by him with payment of his debts, &c. and remains chargeable with the bequest to J. T. and his children:

that T. H., as executor of G. H., is entitled to 100*l.*, on mortgage of a public house:

house, with the appurtenances, situate at aforesaid, and known by the sign of the White Lion, in the tenure or occupation of [W. E.] : And *We* do further find, that all claim, interest, and demand which the said [J. H.], [*Jane* M.], or the said [J. M.], in her right, and the said [J. S.], in right of his said late wife, or either of them, ever had, in or upon the estate or effects, or under or by virtue of the wills of the said [T. T.], [G. H.], and [J. H.], or of either of them, have been fully satisfied and discharged. And *We* the said [*three arbitrators*], do hereby award, order, and adjudge, that the said [C. H.], her heirs, executors, or administrators, shall, within one calendar month from the day of the date hereof, deliver into the hands of the said [T. H.], or of his certain attorney, his executors or administrators, all deeds and other writings in her custody, possession, or power, relating to, or in any way affecting the said freehold house, with the appurtenances, known by the sign of the White Lion : *And* shall also, within one calendar month from the day of the date hereof, convey (*c*), by a good and sufficient conveyance and

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and that all demands of the claimants under the wills have been fully discharged.

Award that C. H. shall, within one month, deliver to T. H. all deeds and writings in her custody relating to the public house.

and within one month convey and deliver possession of

(*c*) Although an award cannot have the operation of conveying land, yet, as a defendant may conclude himself by his own agreement from disputing the title of the lessor in ejectment, an award under a submission to arbitration will give a good title, on which to maintain an ejectment. Thus, where ejectment was brought for lands in the county of Glamorgan, it appeared in evidence on the part of the plaintiff, that in the year 1799, a prior ejectment having been brought on the demise of the same lessors against this defendant, for part of the same premises, which were leasehold, it was agreed to refer the matter to arbitration; and accordingly bonds of arbitration were entered into, and the two arbitrators awarded, that the lands were the property of Morris, and that the possession should be delivered to him : but the defendant not being satisfied with the award, applied to the Court of King's Bench to set it aside, but without effect; notwithstanding which he still retained the possession of the premises : upon which this ejectment was brought. To support the title of the lessors of the plaintiff, the submission to arbitration, and the award, were given in evidence, and relied on as conclusive evidence of the title of Morris. The counsel for the defendant offered to go into evidence of his title, and objected that the

Where the lessor of the plaintiff and the defendant in ejectment have referred their right to the lands to an arbitrator, who has awarded in favor of the lessor, the award concludes the defendant from disputing the lessor's title in an action of ejectment.

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freehold premises, and all deeds and writings relating thereto to T. H.: that C. H. shall retain all the other effects which have or may come to her hands as executrix of J. H. (except any rents she may have received since his death, on account of freehold estate) in full satisfaction of all claims under the three wills: that T. H. shall, out of the mortgage of the public house, and out of the

assurance in the law, and deliver possession of the said freehold house and close, with the appurtenances, situate at aforesaid, and all deeds and other writings relating to, or in any way affecting the same, or the title thereof, to the said [T. H.], or his certain attorney, or his heirs. And *We* do further award, that the said [C. H.] shall retain for her own use and benefit all other the effects which came, or which may hereafter come to her hands or possession, as executrix of the last will and testament of the said [J. H.], (*Save* and except any rents which she may have received since the decease of the said [J. H.], for or on account of the said estate at aforesaid,) in full satisfaction of all claim, interest, and demand which she has or ever had in or upon the estate and effects, or under or by virtue of the said several wills of the said [T. T.], [G. H.], and [J. H.], or of either of them. And *We* do hereby further award, that the said [T. H.] shall, out of the said mortgage on the said house, with the appurtenances, at , called the White Lion, and out of the said freehold house and close at , pay, satisfy, and discharge, the bequest to the said [J. T.], and his children,

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award was not a sufficient title for the lessors of the plaintiff, for that the award could convey no title. It was urged, that it might have been enforced by rule of court, or action on the bond, if the possession was refused by the defendant; but that it did not avail there. Lawrence, J. "I am of a different opinion. The parties chose these gentlemen as judges to determine the right between them. They have determined that right, and their decision is binding on the parties, and I think is conclusive evidence of the right between them here." Verdict for the plaintiff. The Learned Judge's opinion was confirmed by the Court of King's Bench, on a motion for a new trial, in *Mich.* T. 1802. *Doe* ex dem. *Greville* and others v. *Roper*. At Hereford Oxford Summer Assizes, 1802. T.'s MSS. Woodfall's Landlord and Tenant, 420, 3d ed. *Doe* ex dem *Morris* and others v. *Rosser*, 3 East, 11, S. C.

An award does not confer the right to maintain an action of trover for a personal chattel, unless the defendant accept the com-

The above decision is founded on the peculiar nature of the principles which prevail in an action of ejectment. For an award does not confer the right to maintain an action of trover for a personal chattel. Thus, where all matters in difference between a landlord and tenant having been submitted to arbitration, it was awarded, amongst other things, that the latter should deliver to the former a stack of hay upon

according to the direction of the said will of the said [T.T.]. *And We* do further award and order, that the said [C. H.] shall account for and pay to the said [T. H.], his executors or administrators, within one calendar month from the date hereof, all rents which she may have received for or on account of either of the estates at . . . and . . . aforesaid, since the decease of her said brother [J. H.]. And *We* do also award and order, that the said [T. H.] shall pay and refund to the said [C. H.], her executors or administrators, all sum and sums of money which she may have advanced or paid the said [J. T.] for and on account of the interest of the said sum of two hundred pounds mentioned in the will of the said [T. T.] since the decease of her said brother [J. H.]. And *We* do likewise award, order, and direct, that the said [T. H.] shall, within one calendar month from the date hereof, pay or cause to be paid to the said [C. H.] the sum of twelve pounds twelve shillings, for and in full discharge of all expenses which she has been at in the repairs of the said houses at . . . and . . . aforesaid, or otherwise howsoever. And *We* do further award, that the said [C. H.] shall seal and execute to the said [T. H.] a release of all demands for or on account of any claim or interest in or upon the estate and effects, or under or by virtue of the wills of the said [T. T.], [G. H.], and [J. H.], or of either of them: *And further*, that the said [C. H.] do and shall, within one calendar month from the date hereof, deliver unto the said [T. H.], his executors or administrators, all books, accounts, discharges, releases, and writings whatsoever, respecting only the estates of the

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freehold premises pay the bequest to J. T. and his children:
that C. H. shall account for and pay to T. H., within one month, all rents she has received on account of both estates since her testator's decease:
that T. H. shall pay to C. H. all interest she has paid to J. T. since the decease of her testator:
that T. H. shall within one month pay to C. H. 12*l.* 12*s.*, in full for all expenses of repairs:
that C. H. shall execute to T. H. a release of all demands under the three wills:
that C. H. shall within one calendar month deliver to T. H. all writings respecting only the estates of

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the premises, at a certain price to be paid for it by the landlord. The tenant refused to accept the money tendered, and to deliver the hay; upon which the landlord brought an action of trover for it: the court held the action not maintainable, saying, that the remedy lay upon the award or the submission; but that, if the tenant had accepted the money tendered, such acceptance would have been a ratification of the award, and an assent on his part to the transfer of the property; without that, it could not be transferred by the mere force of the award. *Hunter* v. *Rice*, 15 East, 100. Caldw. 133. Therefore, where no compensation is awarded to be given for the personal chattel, a change in the property is not effected by the mere operation of the award.

pensation awarded to be given for it.

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said [T. T.] and [G. H.], deceased, or either of them, and which are now in her custody, possession, or power: *And* that when the said [C. H.] shall have fully complied with this our award, in all things hereby ordered to be done by her, then the said [T. H.] shall seal and execute to her a similar release; *And* that the said [J. H.] and [J. M.], in right of his said wife, and the said [J. S.], in right of his said late wife, shall seal and execute similar releases to the said [T. H.] and [C. H.]. And *We* do also award and order, that the said [T. H.] do and shall execute to the said [C. H.] a bond in the penal sum of eight hundred pounds, under a condition to indemnify her the said [C. H.] against all demands of the said [J. T.] and his children, who were living at the time of the decease of the said [T. T.], or any person or persons claiming through them; and also against all and every other person or persons whomsoever claiming under the will and wills of the said [T. T.] and [G. H.], deceased, or either of them. And lastly, *We* do hereby award and order, that the said [T. H.] shall pay, or cause to be paid, all charges and expenses attending the present arbitration. In witness whereof we the said [*three arbitrators*] have hereunto set our hands and seals respectively, the day of , in the year of our Lord 18 .

T. T. and G. H.: that when C. H. shall have fully complied with award, T. H. shall execute to her a similar release: that J. H., and J. M., and J. S., in right of their wives, shall execute similar releases to T. H. and C. H.: that T. H. shall execute to C. H. a bond in 800*l.*, to indemnify her against all demands of J. T. and his children, and all others claiming through them, or under the wills of T. T. and G. H.: and that T. H. shall pay expenses of arbitration.

Testimonium.

Attestation.

Signed, sealed, and delivered, (being first duly stamped (*d*)) in the presence of

Stamp.

(*d*) As to the stamp, *vide ante*, 4, (*d*).

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AWARD *by two Arbitrators, where a Testator devised and bequeathed all his Real and Personal Estates to Trustees, upon trust to pay his Debts, &c. and then till his youngest Son came of Age, to receive the Rents and Profits of his Real and Personal Estates, Business of Farming, &c. and apply the same in maintaining and cloathing his Wife and Children, (excepting a Married Daughter); and when the youngest Son attained Twenty-one, to sell the Real and Personal Estates (excepting a Close of Land which he devised to his Son C. P. in Fee); and to divide the Surplus Monies amongst his Wife and Children then living, equally (deducting certain Sums as to Children he had advanced); J. B. P., the only acting Trustee, having paid various Sums to his Brothers in Part of their Shares, and having delivered to C. P. Part of the Farming Stock, &c., and there being a Dispute as to the Sum to be allowed by C. P.: and J. B. P. and T. P. having had Dealings together in Trade, as to which Disputes had arisen, all the Parties had agreed to refer the Executorship Accounts, and all other Differences between them, to the Award of the two Arbitrators, or an Umpire then named by the Parties; and the Parties having enlarged the Time for the Arbitrators making their Award; and it appearing to them, that the whole of the Real and Personal Estates had been converted into Money, (except a Piece of Copyhold Land, and a Leasehold Dwelling House,)* THAT *J. B. P. shall, within one Month, surrender to J. G. and F. his Wife, in Fee, the Piece of Copyhold Land; the Value whereof the Arbitrators have deduct-*

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ed from their Share: that J. B. P. shall, within one Month, assign to E. P. the Leasehold Dwelling House; and that E. P. shall be entitled to the Rents from Lady Day last; the Value whereof the Arbitrators have deducted from her Share: that J. B. P. shall forthwith pay G. P., I. G., and F. his Wife, S. P., and T. P., several specific Sums: that J. B. P. shall forthwith give E. P. a Bond, with two Sureties named, for securing her Share, with Interest, within Twelve Months: that J. B. P. shall forthwith give to R. P. an Infant, or to her Appointee, a Bond, securing her Share, with Interest, within Three Years; the Interest to be paid half yearly to the Mother, for R. P.'s use: that the Bonds shall be prepared at J. B. P.'s Expense: that C. P. shall forthwith pay J. B. P. the Sum found to be due from him, after deducting his Share under the Will: that J. B. P. shall forthwith pay the Expenses of the Reference and Award; the Arbitrators having made him an Allowance for that purpose: that all Parties entitled to receive Money under the Award, shall give proper Receipts; and, if required, give a GENERAL RELEASE *to the Person paying such Money, but at his Expense:* PROVISO, *that if the Representatives of an Attorney should recover a certain Sum, claimed of the Executor, (but which the Arbitrators believe to be unjust) then Seven-Eighths of the Sum recovered, and of the Costs, shall be paid to J. B. P. by each of the other Parties:* PROVISO, *that if T. P. should be compelled, as Acceptor, to pay a Bill drawn by J. B. P., then J. B. P. shall repay him the same.*

Recital of articles of agreement,

TO ALL TO WHOM THESE PRESENTS SHALL COME, WE [*two arbitrators*] of, &c. *send Greeting.* WHEREAS by articles of agreement in writing, under the hands and

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seals of [J. B. P.] of, &c. tanner, and [E. P.] of aforesaid, widow; [C. P.] of the same place, farmer; [T. P.] of, &c. currier; [G. P.] of aforesaid, tanner; [S. P.] of aforesaid, currier; and [J. G.] of the same place, farmer, and [F.] his wife, (late [F. P.]), bearing date on or about the day of last past, *Reciting* that [C. P.] late of aforesaid, deceased, by his will, bearing date on or about the day of , 18 , devised and bequeathed *All* his real and personal estates both freehold and copyhold, unto his wife [E.], his son [J. B. P.], and his friend [S. A.] of, &c. farmer, their heirs, executors, and administrators, *Upon trust*, in the first place, to pay thereout all his just debts, funeral and testamentary expenses; and then *Upon trust*, to hold the same estates and premises until his youngest son [S. P.] should attain his age of twenty-one years, in case he should so long live; and during such his minority to receive and take the rents, issues, and profits arising from his said real and personal estates, business of farming, &c. and apply the same in the respective maintenance and clothing of his said wife [E.], son [J.], and all his other sons and daughters (except as to the clothing and maintenance thereout of his daughter [F.], then the wife of the said [J. G.]); *And* when his said son [S.] should arrive at the age of twenty-one years, as aforesaid, he directed his said trustees, or the survivor of them, to sell and dispose of all his said real and personal estates as aforesaid, or such of them as were convertible into money, (except his small close of enclosed land or ground lying in the lordship of aforesaid, which he gave and devised to his son [C. P.], party thereto, and his heirs and assigns for ever): *And* after such sale and conversion of his estates into money, and payment of all necessary expenses attending such sales, to divide such money arising as aforesaid unto and equally amongst his said wife [E.], son [J.], and all the others of his sons and daughters as should be then living, share and share alike, except his son [T.], to whom he bequeathed fifty pounds less than an equal share, he having received a compensation, by being put out apprentice; and also except the like sum of fifty pounds less for his daughter [F.], the wife of the said

reciting that testator devised and bequeathed all his real and personal estates to trustees,

upon trust to pay his debts, &c.

and then till his youngest son came of age,

to receive the rents and profits of his real and personal estates, business of farming, &c.

an apply same in maintaining and cloathing his wife and children, (excepting a married daughter):

and when the youngest son attained twenty-one, to sell the real and personal estates,

(excepting a close of land which he devised to his son C. P. in fee)

and to divide the surplus monies amongst his wife and children then living, equally, except his son T., to whom he bequeathed 50*l.* less,

and except 50*l.* less for a daughter, on account of advancements:

appointment of executors:

and reciting testator's death without revoking his will, leaving his widow and children him surviving:

and that J. B. P. alone proved the will:

[J. G.], she having then had an advancement of that amount since her marriage: *And* that the said testator appointed his said wife [E.], son [J.], and the said [S. A.], joint executors and trustees of his said will: *And reciting* that the said [C. P.], (the testator) departed this life soon after making the said above in part recited will, without revoking or altering the same; leaving the said [E. P.], his widow, and the said [J. B. P.], [C. P.], (party hereto), [T. P.], [G. P.], [S. P.], [F.], the wife of the said [J. G.], and [R. P.], his children, him surviving: *And reciting*, that the said [J. B. P.] alone proved the said will in the Prerogative Court of the Archbishop of Canterbury, and took upon himself the burthen of the execution thereof: *And reciting*, that by a certain agreement, made and entered into in the year 18 , by and between the widow and such of the children of the said testator as were then of age; which said agreement being mislaid, reference could not then be had to it; but the purport thereof was, as appeared by the draft of the said agreement, that the said parties thereto did agree with each other, that an immediate valuation and division of the said testator's personal estate and effects should take place; and that the money arising therefrom should be paid and divided to and amongst them, in such parts, shares, and proportions as is mentioned in the said testator's will, (the share of the said [S. P.] and [R. P.] only excepted): *And reciting*, that the said [J. B. P.] proceeded to a valuation and sale of the property comprised in the said above in part recited will; but no actual division of the said property was then, or had ever since been made; nor did any of the said legatees know what was the amount of their respective shares: *And reciting*, that the said [J. B. P.], as such executor as aforesaid, had paid various sums of money, at different times, to his said brothers, or some of them, in part liquidation of the sum which they were entitled to under the said will of their father; and had also delivered to, or permitted his brother, the said [C. P], to possess himself of the whole, or a considerable part of the farming stock and effects of the said testator; and that there was then a dispute or difference as to the sum which was to be paid or allowed by the said [C. P.], for such

and that by an agreement between the widow, and such of the children as were then of age,

which being mislaid,

it appeared by the draft thereof, that the parties agreed that an immediate valuation and division of testator's personal estate should be made in the shares mentioned in his will,

(shares of two infants only excepted:

and that J. B. P. made a valuation and sale, but no division had been made, nor were the shares ascertained:

and that J. B. P. had paid various sums to his brothers, in part of their shares: and had delivered to C. P. part of the farming stock, &c.

farming stock and effects: *And reciting*, that the said [J. B. P.], and his brother the said [T. P.], had dealings together in trade; and some disputes had arisen between them relative to such dealings: *And reciting*, that all the said persons, parties thereto, were desirous of ascertaining the amount of the respective portions or shares to which they were entitled under the will of the said [C. P.], (deceased); as also, what sums of money, or stock, effects, or other satisfaction, the said widow, or any of the children of the said [C. P.] (deceased), might have received in part liquidation of such respective portions or shares; and also that the said parties were at the same time extremely desirous of avoiding all litigation, disputes, or controversy touching or concerning their late father's property; and had therefore mutually agreed to submit and refer the investigation of the whole of the executorship accounts of the said [J. B. P.]; and all transactions touching or concerning the fulfilment of the trust reposed in and exercised by the said [J. B. P.], under and by virtue of the said above in part recited will; and had also mutually agreed to submit and refer all disputes and differences, of what nature or kind soever, then subsisting between the said [J. B. P.], and any of the persons parties thereto, to the final award of the said [*two arbitrators*]; and in the event of their disagreeing, or not delivering or having ready their award at the time thereinafter mentioned, then to the final award, of [*umpire*], of, &c. farmer: *And* the said parties did also further mutually agree, that the said arbitrators and umpire should have full power and authority to examine all or any of the said parties thereto, as well as their respective witnesses, on oath if they should think necessary; and should also ascertain, award, and determine, what sum or sums of money then remained due to the several persons, parties thereto, under or by virtue of the above recited will of the said [C. P.] (deceased); and should also have full power to determine what sum or sums of money was or were due from any of the persons, parties thereto, to the other of them; and should also order and direct the same to be paid at such times, and in such manner, and such security or securities to be given for the same in the mean time, and such releases, or other discharges given for the

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and that there was a dispute as to the sum to be allowed by C.P.; and that J.B.P. and T. P. had dealings together in trade, as to which disputes had arisen:

and that all the parties were desirous of ascertaining their shares under the will;

and what sums, &c. any of them had received;

and being desirous of avoiding litigation, had agreed to refer the executorship accounts,

and all other differences between them, to the award of two arbitrators, or an umpire then named:

and that the arbitrators and umpire should have power to examine the parties and their witnesses on oath;

and determine what sums remained due to the several parties under the will;

and what sums were due from any of the parties to the other:

and order the same to be paid, in such manner, and such securities and

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releases given, as arbitrator or umpire should deem proper; and award by whom costs of reference should be borne:

same when so discharged, as they the said arbitrators or umpire should deem proper; and should also award by whom, and in what proportions, the costs of this reference should be borne: *It was by the now reciting agreement witnessed*, that for effectuating the purposes aforesaid, the said parties thereto did mutually covenant, promise, and agree to and with the others and other, that they respectively would in all respects well and truly perform and keep the award, arbitrament, judgment, and determination of the said arbitrators or umpire; *so* as the award of the said arbitrators should be made in writing, under the hands of the said arbitrators, ready to be delivered to such of the said parties as should require the same, on or before the day of then next; or under the hand and seal of the said umpire, on or before the day of then next. AND WHEREAS, by an indorsement on the said agreement, bearing date on or about the day of last past, and under the hands of all the said parties to the said agreement, they the said parties mutually and reciprocally consented and agreed, that the time for the said arbitrators making the said award should be enlarged to the day of then next; *And* that they would, in all other respects, abide by the terms of the said agreement. NOW KNOW YE, *That We*, the said arbitrators, having taken upon us the burthen of the said reference, and having examined all such witnesses as were produced before us by the said parties respectively; and having fully weighed and considered all the allegations, proofs, and vouchers made and produced before us; and it appearing to us that the whole of the real and personal property of the late [C. P.] (deceased), hath been converted into money, (save and except a certain small piece or parcel of copyhold land, situate at aforesaid; and a certain leasehold dwelling house and premises, situate in the parish of, &c. now in the occupation of), *Do* award, order, and adjudge, *That* the said [J. B. P.] shall, within one month from the date of this award, duly surrender, or otherwise convey and assure unto the said [J. G] and [F.] his wife, their heirs and assigns, or as they shall direct, and at their own costs and charges, *All that* the aforesaid close, piece or parcel of copyhold land,

reciting agreement witnessed, that the parties mutually covenanted to perform award of arbitrators or umpire;

so as the award or umpirage should be made by given days.

Recital of the parties having enlarged the time for the arbitrators making their award.

Testatum.

It appearing that the whole of real and personal estates had been converted into money,

(except a piece of copyhold land, and a leasehold dwelling house)

award that J. B. P. the only acting trustee and executor, shall, within one month, surrender to

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situate in aforesaid, and now in the occupation of ; and which we do adjudge to be of the value of fifteen pounds, and have accordingly deducted the amount thereof from the sum which we find to be due to the said [J. G.] and [F.] his wife, from the said [J. B. P.]. AND we do further award, that the said [J. B. P.] shall, within one month from the date of this award, assign unto the said [E. P.], her executors, administrators, or assigns, at her or their expense, *All that* the aforesaid leasehold dwelling house and premises, situate in aforesaid, for all the residue and remainder of the term now to come therein: *And* we do direct, that the said [E. P.] shall be entitled to the rents and profits thereof from Lady Day last, we having adjudged the residue of the said term to be of the value of 100*l.*, and have accordingly deducted the amount thereof from the sum which we found to be due from the said [J. B. P.] to the said [E. P.]. AND we do further award, that the said [J. B. P.] shall forthwith pay or cause to be paid, unto the respective parties hereinafter named, the sums following; that is to say; unto the said [G. P.] the sum of 431*l.* 17*s.* 9*d.*; unto the said [J. G.] and [F.] his wife, the sum of 393*l.* 19*s.* 9*d.*; unto the said [S. P.] (*a*), the sum of 330*l.* 1*s.* 9*d.*; and unto the said [T. P.] the sum of 122*l.* 18*s.* 8*d.* AND we do further award, that the said [J. B. P.] shall forthwith give unto the said [E. P.] one good and sufficient bond, under the hand and seal of the said [J. B. P.], and also under the hands and seals of [W. B.], of, &c. gentleman, and [H. S. B.], of the same place, gentleman, who have consented to join (*b*) the said [J. B. P.] in such bond, securing to her the said [E. P.] the sum of 277*l.* 12*s.* 9*d.* twelve months after the date of such bond; with lawful interest from the date thereof: *And* that the said [J. B. P.] shall also forthwith give unto the said [R. P.], who has not yet

J. G. and F. his wife in fee, the piece of copyhold land; the value whereof the arbitrators have deducted from their share:

that J. B. P. shall, within one month, assign to E. P. the leasehold dwelling house; and that E. P. shall be entitled to the rents from Lady-day last:

the value whereof the arbitrators have deducted from her share;

that J. B. P. shall forthwith pay G. P., J. G., and F., his wife, S. P. and T. P. several specific sums:

that J. B. P. shall forthwith give E. P. a bond, with two sureties named, for securing her share with interest within twelve months:

that J. B. P. shall forthwith give to R. P. an

(*a*) The fact that S. P. had attained his age of twenty-one years, is not stated; but it should have been. For until that event arrived, or otherwise became impossible by his death, all the shares were contingent. *Vide ante*, 69.

(*b*) *Vide ante*, 55, (*d*).

Where a fund is given to those living at an infant's majority or death, the fact of vesting should be stated.

RESPECTING CLAIMS UNDER A WILL, AND MATTERS OF ACCOUNT.

infant, or to her appointee, a bond securing her share with interest, within three years; the interest to be paid half yearly to the mother, for R. P.'s use; that the bonds shall be pre-

attained the full age of twenty-one years(*c*), or to whom she may appoint, one good and sufficient bond, under the hand and seal of the said [J. B. P.], and also under the hands and seals of the said [W. B.], and [H. S. B.], who have consented to join the said [J. B. P.] in such bond, securing to her the said [R. P.] the sum of 352*l.* 4*s.* 6*d.* three years after the date of such bond, with lawful interest in the mean time; such interest to be paid half yearly to the said [E. P.], for the use and benefit of the said [R. P.]; and the receipt of the said [E. P.] for such interest to be a sufficient discharge to the said [J. B. P.]. AND we do award, that the said beforementioned bonds shall be pre-

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It seems that in ordinary cases, a trustee cannot be awarded to pay an infant's share.

(*c*) If the award had been, that the trustee should have paid the infant's share, it would have been unreasonable; *vide ante*, 14; because there was no person who could give a valid discharge: and if he had paid it to the parent or guardian, he might have been compelled to repay it to the infant on her coming of age. *Vide ante*, Vol. II. 406. And it seems, that the trustee could not have been properly directed to pay the share into the bank, under the 36 Geo. III. c. 52. s. 32. because he has the residue in the character of a trustee, and not as an executor or administrator. *Vide ante*, Vol. II. 406.

The submission of an infant is voidable, if not void.

These observations assume the submission to have been properly made; but the validity of this part of the award seems doubtful, because the infant is a stranger to the submission. *Vide ante*, 15. It has been held, that an infant may submit to arbitration, but that it is optional with him whether he will abide by the award when he comes of age. *Knight* v. *Stone*, Jon. 164. *Stone* v. *Knight*, Lat. 207. Noy, 93, S. C. However it has also been held, that the submission of an infant is void, and not merely voidable. *Rudston* v. *Yates*, Mar. 112, 141. *Gill* v. *Russell*, Freem. 139. *Bowyer* v. *Blorkside*, 3 Lev. 17: and upon principle, this seems to be the better opinion. The Court of Chancery will not decree the performance of an award which shall bind an infant. *Cavendish* v. ———, 1 Ch. Cas. 279. [See *Godfrey* v. *Wade*, 8 J. B. Moore, 488.]

But a guardian, or any other person, may bind himself that an infant shall perform an award.

But though an infant cannot submit, yet his guardian may submit for him, and bind himself that the infant shall perform the award. *Roberts* v. *Newbold*, Comb. 318. Consequently any other person, as well as a guardian, may be bound for an infant's performing an award. [See *Bristow* v. *Binns*, 3 Dow. & Ry. 184; and *Riddell* v. *Dowse*, 6 B. & C. 255.]. In this respect there is a deficiency in the submission, on which the above award is made.

pared at the sole expense of the said [J. B. P.] And we do further award, that the said [C. P.], the party to the said above in part recited articles of agreement), shall forthwith pay, or cause to be paid, unto the said [J. B. P.], the sum of 730*l.* 8*s.* 11½*d.*, which is the sum we find to be due to the said [J. B. P.] from the said [C. P.], after deducting the share which the said [C. P.] is entitled to under the will of his late father. And further, we do hereby award, that the said [J. B. P.] shall forthwith pay, or cause to be paid, the whole of the charges and expenses attending this reference, and the making of this award, we having made the said [J. B. P.] an allowance towards the payment thereof, previous to apportioning the respective sums due from time to time to the other parties hereto: And we do further award, that all or any of the said parties, who shall be entitled to receive any sum or sums of money under this award, shall, on the receipt thereof, sign and give proper and legal receipts for the same; and also at the same time, or at any time afterwards, execute and give to the party paying such sum or sums of money, if he shall require it, a release of all claims and demands whatsoever against the party so paying such money, from the beginning of the world up to the day of the date of this award: such release or releases nevertheless to be prepared at the sole expense of the person requiring the same. Provided always, and we do hereby award and adjudge, that in the event of the executors, administrators, or other legal representatives of [*solicitor*], late of, &c. attorney at law, deceased, should recover by the verdict of a jury, all or any part of a certain claim of 200*l.* which has been claimed of the executor of the said [C. P.], deceased, (but which, upon strict examination, we believe to be unjust, and cannot be substantiated), then, and in such case, we do adjudge and award, that seven-eighths of any sum which may be so recovered as aforesaid, as well as seven-eighths of any costs which may be incurred in consequence thereof, shall be repaid to the said [J. B. P.] in the proportions following; that is to say; one eighth part thereof by each of them the said [E. P.], [J. G.], [G. P.], [C. P.], [T. P.], [S. P.], and [R. P.]. Provided also, and we do further direct, that in the event of the said [T. P.] being at

pared at J. B. P.'s expense:

that C. P. (the son) shall forthwith pay J. B. P. the sum found to be due from him, after deducting his share under will:

that J. B. P. shall forthwith pay the expenses of reference and award;

the arbitrators having made him an allowance for that purpose:

that all parties entitled to receive money under the award shall give proper receipts:

and, if required, give a general release to the person paying such money, but at his expense:

proviso, that if the representatives of an attorney should recover a certain sum claimed of the executor, (but which the arbitrators believe to be unjust) then seven eighths of the sum recovered, and of the costs, shall be paid to J. B. P. by each of the other parties:

Proviso that if T. P. should be compelled, as

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acceptor, to pay a bill drawn by J. B. P., then J. B. P. shall repay him same.

any future time compelled to pay any sum or sums of money in consequence of his being the acceptor of a certain bill of exchange drawn by the said [J. B. P.] some time in the year 18 , for 188*l.*; and which bill is now in the hands of [J.C.G.] of, &c. aforesaid, banker; then and in such case, he the said [J. B. P.] shall repay, or cause to be repaid, to the said [T. P.], all such sum or sums of money that he may have been compelled to pay as acceptor of such bill of exchange as aforesaid. IN WITNESS whereof we have hereunto set our hands and seals, the day of , 18 .

Testimonium.

AS TO TESTATOR'S INTENTION, LEGATEES' CLAIMS, AND PARTNERSHIP ACCOUNTS.

AWARD *by three Arbitrators, respecting the Estate and Effects of a Testator, on a Submission by the Executors, and the Persons interested,* THAT *the Testator's Intention was to give, devise, and bequeath to several Persons, certain enumerated Legacies and Property; which the Arbitrators award accordingly: that the Legatees and Devisees, and those claiming under them, shall remain satisfied therewith: that the Executors shall pay P. M. G. a certain Sum in full of all Demands on the Testator's Estate, for the Balance of Account: that One Half of the Book Debts owing to the Testator, and P. M. G. as Partners, belongs to P. M. G.; and the other Half to the Testator's seven Grandchildren: that all the Furniture in a House, at the Testator's Death, belongs to E. A.: and that the Residue of the Testator's Estate shall be equally divided amongst P. M. G., and the Testator's six other Grandchildren: that the Executors shall pay P. M. G. One Half of the Book Debts, and to each of the Grandchildren an equal Portion of the other Half; and their unpaid Proportion of*

the Shipping Concern, pursuant to an Agreement between the Executors and P. M. G. (which Agreement the Arbitrators confirm) ; and also of such other Part of the Shipping Concern as is not included in the Agreement ; and of the Residue of the Testator's Estate, when from Time to Time received, to the Amount of 140*l.* : *that the Devisees and Legatees, and those claiming under them, shall execute Releases for Monies paid : that the Executors shall pay the Expenses of Reference : and that on Performance of the Award, all Differences between the Parties shall cease.*

AS TO TESTATOR'S INTENTION, LEGATEES' CLAIMS, AND PARTNERSHIP ACCOUNTS.

TO ALL TO WHOM THESE PRESENTS SHALL COME, *We,* [*three arbitrators*] of, &c. *send Greeting* (*a*). WHEREAS in and by a certain indenture, bearing date, &c. and made between, &c. (*reciting nearly the whole of the indenture,* ante, Vol. II. 626.) *As* by the said indenture, relation being thereunto had, may more fully and at large appear. NOW KNOW YE, that we the said [*three arbitrators*], having taken upon ourselves the charge of the said award, and having heard, and duly and maturely weighed and considered the several allegations, vouchers, and proofs brought before us by and on behalf of the said parties respectively, are of opinion, *That* the intention (*b*) of the

Recital of deed of submission.

Testatum.

That the testator's intention

(*a*) This award is made in pursuance of the submission, *ante,* Vol. II. 626.

(*b*) Though a court of equity, where the only object of the bill is to set aside an award, will not permit the plaintiff to discuss legal objections to it, but will confine him to those for partiality and corruption ; yet it seems, that if the bill, besides praying to set aside the award, pray also for an account, he will be permitted to make legal objections, in order to let in such an account. Vide *Champion* v. *Wenham,* Ambl. 245.

On a bill merely to set aside an award, the plaintiff cannot go into legal objections; but it seems he may, if the bill be also for an account.

If indeed the arbitrators appear to be mistaken in a *doubtful* point of law, the award may be permitted to stand, though the court, after great deliberation, should be of a different opinion. *Dictum* per Lord Hardwicke, *Ridout* v. *Paine,* 3 Atk. 495.

If the arbitrator appears to be mistaken in a doubtful point of law, the award may stand.

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was to give, devise, and bequeath to several persons, certain enumerated legacies and property;

said [*testator*], deceased, was, by his last will and testament, to dispose of, give, devise, and bequeath the following legacies and property; namely; unto his widow [E. M.], the interest or dividends arising from four thousand pounds, three per centum consolidated bank annuities; and the use of the household furniture, plate, and utensils in and appertaining to the testator's house at Plaistow, wherein he died, his chariot, a horse, and cow, (valued together at 642*l.* 1*s.* 1*d.*) during her natural life; *And* from and after her decease, the said annuities, household furniture, plate, and utensils, to be the property of, and divided amongst his seven grandchildren, the above-named [P. M. G.], &c. by even and equal portions: *Unto* the said [P. M. G.], &c. all his

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If the arbitrator, meaning to follow the law, mistake it, this is a good reason for setting the award aside; but not where, regardless of the law, he makes an equitable decision.

Thus in the case of the above submission, where no lawyer could doubt upon the point of law, this distinction was laid down by the Court of King's Bench:—That where the arbitrators, meaning to follow the law in their determination, happen to mistake it, this is a good reason for setting aside their award, so far as it is affected by that mistake: but where, knowing what the law is, or laying it entirely out of their consideration, they make what they conceive, under all the circumstances of the case, to be an equitable decision, it is no objection to the award that in some particular point it is manifestly against law.

Statements of the facts and circumstances on which the above award was founded.

The circumstances of the above case were as follow: a man, having five grandchildren by a deceased daughter, and a daughter living who had two children, by his will gave to his eldest grandson, by his deceased daughter, a legacy of two thousand pounds; to one of his granddaughters by his deceased daughter, two thousand pounds; to each of the other three children of his deceased daughter, and to each of the two children of his living daughter, one thousand pounds; and to his living daughter a pecuniary legacy, about which it was disputed whether it was intended by the testator to be one, two, or three thousand pounds: to his daughter, and to several of his grandchildren, he gave several real estates, in words which conveyed only an estate for life to each of the respective devisees. There were other bequests, about which there was no dispute; and of the residue of his personal property, consisting of various particulars, and amounting in the whole to about twelve thousand pounds, he made no disposition. He made his two sons-in-law executors. His eldest grandson by his deceased daughter, claimed the half of the book debts, and a considerable sum be-

AS TO TESTATOR'S INTENTION, LEGATEES' CLAIMS, AND PARTNERSHIP ACCOUNTS.

the testator's interest or concern in shipping, and the benefit to arise therefrom, share and share alike: *Unto* the said [P. M. G.], the house then occupied by his father, the said [E. G.] the elder: *Unto* the said [L. B.] the house then occupied by [Mrs. F.]: *And* unto the said [E. G.], the younger, the house then occupied by [Mr. G.]; all which houses are situate in or near Broad Street, in the said parish of Saint George in the East: *Unto* the said seven grandchildren, the following specific legacies, or sums of money; that is to say; to the said [P. M. G.] and [L. B.], the sum of two thousand pounds each; to the said [E. G.] the younger, [Jos. G.], [John G.], [P. A.], and [S. A.], one thousand pounds each; *And* to his daughter the said

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sides, as partner in his trade. The executors resisted this claim; in consequence of which a general submission was made to the award of three gentlemen, who were supposed to have been well acquainted with the intentions of the deceased. The parties to the submission were the executors, of the first part; the eldest grandson by the deceased daughter, of the second part; and the same grandson, the husband of the living daughter, and the rest of the grandchildren, and the husbands of such of them as were females and married, of the third part. The arbitrators, by their award, among other things, for which the award was not impeached, directed that the several devisees of the real estate should hold the several parts respectively devised to them in fee simple; that the executors should pay to the eldest son of the deceased daughter a considerable sum, as the balance due to him as partner with the testator; that they should also pay him another sum, being the moiety of the book debts due to the partnership; and that the remainder of the book debts, together with all the residue of the personal property, should be equally divided among the seven grandchildren of the testator. The submission to this award was made a rule of the Court of King's Bench, under the statute. On the part of the husband of the deceased daughter, an application was made to the Court to set aside this award, on these objections: First, that the arbitrators had declared the eldest grandson by the deceased daughter of the testator to have been a partner in his trade; whereas, in fact he never had been such partner, and the question of partnership had never been discussed by the arbitrators in the presence of the applicant; and, secondly, that the arbitrators had, in two particulars, taken upon

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which the arbitrators award accordingly:

[E. A.], the sum of three thousand pounds; and also the house and land, situate in Plaistow aforesaid, then and now in the occupation of the said [J. A.]; together with his coach and horses. THEREFORE *We do* hereby appreciate and fix the aforesaid devises, legacies, and bequests, made, given, and bequeathed, or intended to be made, given, and bequeathed, to the said [E. M.], [P. M. G.], [L. B.], [E. G.] the younger, [Jos. G.], [John G.], [P. A.], [S. A.], and [E. A.] respectively, in and by the last will and testament of the said [P. M.], deceased, in manner abovementioned. AND we do award and confirm the same to the said devisees and legatees, their heirs and assigns respectively.

that the legatees and devi-

AND we order and direct the said several devisees and le-

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themselves to *make* a will for the testator, instead of *explaining* what he had made; first, that they had given to the several devisees of the real estates, estates in fee simple, whereas the testator had given them only estates for life; the consequence of which was, that the reversion in fee belonged to the living daughter, and to the eldest son of the deceased daughter, in coparcenary; and, secondly, that they had directed the residue of the personal property to be divided equally among the *seven* grandchildren of the deceased; whereas by the statute of distributions, it belonged in equal moieties to the *living* daughter, and to the *five* grandchildren by the *deceased* daughter. The first objection was fully answered by the affidavits of the arbitrators, and of the eldest grandson of the testator by his deceased daughter; and by the same affidavits it appeared, that with respect to the real estates, the award had only confirmed some agreements which had been made among the parties themselves. With respect to the objection to the manner in which the arbitrators had disposed of the residue of the personal property, the court suggesting the distinction above stated, directed that the arbitrators should make an additional affidavit, and state whether they had intended to follow the statute of distributions, or had laid it entirely out of their consideration, and decided on equitable circumstances. The arbitrators made such additional affidavit, in which they stated, "that in disposing of the residue among the seven grandchildren, they did not conceive they were making any distribution of it according to any fixed rules of law upon the subject, but that they were dealing out to the several parties interested what appeared to them to be, according to the best of their judgment, under all the circumstances of the case, strict

Affidavit of arbitrators, that in making their award they were not governed by the rules of law.

gatees, and all and every person or persons claiming, or to claim for, by, or from or under them, or any of them, to be and remain fully satisfied and contented with the sums and proportions of the estate, goods, chattels, and credits of the said [*testator*], deceased, hereinbefore specified, so far as relates thereto, or to any part thereof. AND we do order and direct, that the said [E. G.] the elder, and [J. A.], as executors as aforesaid, do and shall well and truly pay, or cause to be paid unto the said [P. M. G.], at, &c., on &c. between the hours, &c. the sum of 1690*l.*, in full of all claims and demands the said [P. M. G.], or his representatives, can or may have on

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sees and those claiming under them, shall remain satisfied therewith; that the executors shall pay P. M. G. a certain sum in full of all demands

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and impartial justice, agreeably to what they believed to have been the intention of the testator." The court thought this a sufficient answer to the objection, and discharged the rule. *Ainsley* v. *Goff*, Hilary Term, 1799, Kyd on Awards, 351, 2d ed. In this case the court acted as a court of equity. It might have been taken as a preliminary objection to the application, that the court could not, under the statute, enter into *legal* objections to the award in this stage; but that objection was not urged.

If an arbitrator profess to decide upon the law, and he mistake it, the court will set aside the award; although the arbitrator's reasons do not appear on the face of the award, but only on another paper delivered therewith.

Where the arbitrator professed to decide upon the law, and delivered in, together with the award, a paper, containing observations upon the evidence before him, together with his reasons for deciding as he had done, the court set aside the award for a mistake in point of law; observing, that the paper having been delivered under such circumstances, the statement of the arbitrator's reasons contained in it, was to be considered in the same light as if it had appeared upon the face of the award itself; and as it was evident from thence, that the arbitrator had proceeded upon a ground unsupported by law, whereas he plainly intended to decide according to law, the award was not such as he intended it to be. So it seems it would be if such reasons appeared in any other authentic manner to the court. *Kent* v. *Elstob*, 3 East, 13; and see *Aubert* v. *Maze*, 2 Bos. and Pull. 371. But in *Delver* v. *Barnes*, 1 Taunt. 48, the Court of Common Pleas ruled, that it is not a sufficient ground for an application to set aside an award, on the face of which no objection appears, to state facts, from which it may be inferred, that an incorrect notion of the law of the case subsisted in the mind of the arbitrator.

But facts cannot be stated by the parties in order to infer an incorrect notion of law.

On an application for an attachment for non-performance of an award, it is competent to the parties, *to object to the award*, for any illegality apparent on the face of it, though the time for applying to set it aside is expired. *Pedley* v. *Goddard*, 7 Durnf. and

On an application for an attachment, the parties may *object* to the award

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on testator's estate, for balance of account:
that one half of book debts owing to testator and P. M. G., as partners, belongs to P. M. G.

the estate of the said [*testator*], deceased, for the balance of account due to him as partner with the said late [*testator*] at the time of his decease: *And* we do direct the said [P. M. G.] to receive the said sum accordingly. And we do hereby further award and order, that one moiety of the book debts due and owing to the said [*testator*], deceased, and the said [P. M. G.], as partners in trade, and which have been taken by the said [P. M. G.], at and for the sum of 1375*l.*, shall be the property of the said [P. M. G.]; and that the remaining moiety thereof shall be the property of and divided among the said seven grandchil-

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for apparent illegality at any time:
but the parties cannot *apply* to set aside an award, for apparent illegality, after the time limited by the statute.

East, 73. [*Payne* v. *Massey*, 9 J. B. Moo. 666.] *Ante*, Vol. II. 579. But the court will not listen to *an application to set aside an award*, for any defect whatsoever, after the time limited by the statute 9 and 10 Wm. III. c. 15; 7 Durnf. and East, 73; although such defect appear on the face of the award. *Lowndes* v. *Lowndes*, 1 East, 276.

The court will not set aside an award on the ground, that the arbitrator was mistaken in law, unless the principles of law on which he has decided appear on the face of the award.

But the court will not set aside an award on the ground that the arbitrator was mistaken in law, unless the principles of law upon which he has decided appear on the face of the award. *Anon.* 1 Chit. Rep. 674. And where the law and fact are referred to an arbitrator, the award will not be set aside, unless there appear to be error in law on the face of it. *Doe* v. *Thompson*, 1 Chit. Rep. 674, (*a*). *Bouttilier* v. *Thick*, 1 Dowl. and Ryl. 366. Thus, where a cause, involving a question of law, was referred to a barrister, under a rule of court, to settle all matters in difference between the parties; and he made his award thereupon, but the question of law did not appear on the face of the award; the court, considering that it was the intention of the parties to refer the decision of the merits, as well on the matter of law as of fact, to the arbitrator, refused to open the award again, on a suggestion of the arbitrator's mistake in point of law on the construction of a contract between the parties. Lord Ellenborough said, "that there was a great difference in these cases, in considering the object of the reference, and the description of the person to whom the decision is confided by the parties. In ordinary cases, where questions of fact are referred to one who is supposed to be competent to deal with such questions, though not with questions of law, and a question of law should happen to arise, on which he decides in a manner disturbing the whole justice of the case, the court would enter into the enquiry, and correct what was erroneous in the decision. But where a doubtful question of law arose between parties, it often happened, that on such very account they agreed to refer the matter to

dren of the said [*testator*], deceased. We do also award unto the said [E. A.], all the household furniture and utensils that were in the house now occupied by the said [J. A.], at the decease of the said late [*testator*], together with every article then in, upon, or in any wise belonging or appertaining to the said house and premises. And we do moreover award and order, that all the rest, residue, and remainder of the estate, goods, chattels, and credits of the said [*testator*], deceased, shall be the pro-

and other half to testator's seven grandchildren: that all the furniture in a house at testator's death belongs to E. A.: and that the residue of testator's estate shall be equally divided

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the arbitration of a gentleman of the profession, meaning to refer the decision of the matter of law to him, and to abide by his determination of it." And his lordship added, "I fear it is impossible to lay down any general and certain rule upon this subject, in what cases the court will not suffer an award to be opened: it must be subject to some degree of uncertainty, depending upon the circumstances of each case. But it is sufficient to say, that, in the present case, where the merits in law and in fact were referred to a person competent to decide upon both, we will not open the award, unless it can be shewn to be so notoriously against justice, and his duty as an arbitrator, that we can infer misconduct on his part." The other judges agreed thereto; Mr. Justice Le Blanc adding, that "where the question of law necessarily arises upon the face of the award, there the court must take notice of it." *Chace* v. *Westmore*, 13 East, 357. [And see *Sharman* v. *Bell*, 5 M. and S. 504. *Cramp* v. *Symons*, 1 Bing. 104. *Price* v. *Jones*, 2 Yo. and Jer. 114.] So where two parties agreed to be bound by the opinion of a professional man, on the construction of an act of parliament, who gave his opinion in favour of one; such opinion was considered as final and conclusive; though it recommended the printed statute to be compared with the parliament roll before the matter was settled, under a doubt whether the statute was not misprinted. For the opinion when given was in the nature of an award, and became final between them, and the court would not look into it to see whether it was strictly right. If the statute was misprinted, it was incumbent on the plaintiff to shew that fact: not having done so, it must be taken to be correct. *Price* v. *Hollis*. 1 Maule and Selw. 107. Nor will the court set aside an award on the ground that the arbitrators have decided contrary to law, unless the law be clear upon the subject; and, therefore, where the captain of a ship, at an intermediate port, in order to pay for repairs, had necessarily sold part of the cargo,* at a price higher than it would

Nor will the court set aside an award on the ground that the arbitrator has decided contrary to law, unless the law be clear upon the subject.

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* As to the power of the master of a ship, in a case of necessity, to sell part of the cargo, or hypothecate the ship, cargo, and freight, at

Sale and hypothecation by master of ship.

amongst P. M. G. and the testator's six other grandchildren: that the executors shall pay P. M. G. one half of the book debts, and to each of the grandchildren an equal portion of the other half;

perty of, and divided among his said seven grandchildren, the said [P. M. G.], [L. B.], [E. G.] the younger, [Jos. G.] [John G.], [P. A.], and [S. A.], by even and equal portions. And we do likewise award, order, and direct, that the said [E. G.] the elder, and [J. A.], as executors as aforesaid, do and shall well and truly pay, or cause to be paid unto the said [P. M. G.], one moiety of the said book debts; and to each of them the said [P. M. G.], [J. B.] the younger, in right of his wife, the said [L. B.], [E. G.]

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have fetched at the port of destination, and upon a reference, to settle the average loss between the ship owners and charterers, the arbitrators, (who were mercantile men,) allowed for the actual value of the goods when sold, and not for the price they would have fetched at the port of destination; the court refused to set aside the award. *Richardson* v. *Nourse*, 3 Barnw. and Ald. 237.

In equity, an award cannot be disturbed for mistake, upon a question of law referred.

A court of equity seems generally inclined to go farther than a court of law in supporting an award, where a question of law only is referred. Thus, under a general reference of all matters in dispute, the arbitrator, a clergyman, had made an award deciding all the questions: and on a motion to rectify an error in law, alleging no other ground, but that the arbitrator had made a wrong decision upon a question of law, the Lord Chancellor, Lord Eldon, refused the motion, and said, "If a question of law is referred to an arbitrator, he must decide upon it; and though he decides wrong, you cannot help it. In a case before Lord Rosslyn, Mr. Mansfield and I endeavoured to open an award on the ground of mistake of the arbitrator; the question referred being as to the vesting of a legacy: but it was held it would not do." *Ching* v. *Ching*, 6 Ves. 282. The report does not state whether the error in law appeared on the face of the award; which circumstance, in questions of this kind, is the point of distinction in courts of law. In a subsequent case, an award was made under a general reference of all matters in dispute, and an injunction was applied for to prevent the execution of it, on the ground of mistake by the arbitrator; but no application was made to set aside the award. Lord Eldon said, "the Court of King's Bench have lately (*Kent* v. *Elstob*, 3 East, 18.) quarrelled with a decision of Lord Rosslyn, followed by me, (*Ching* v.

If an arbitrator under a general reference, meaning to decide according to law, mistakes, the court will set that right; yet, if the parties choose to refer matters of law, meaning to have the judgment of the arbitrator upon them, instead of that of the court, the

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maritime interest, to pay the expenses of repairs, &c. in a foreign port, by virtue of the universal law of nations, *vide infra*, Index to the Notes, title Hypothecation.

AS TO TESTATOR'S INTENTION, LEGATEES' CLAIMS, AND PARTNERSHIP ACCOUNTS.

the younger, [Jos. G.], [John G.], [P. A.], and [S. A.], an equal portion of the other moiety of the said book debts; and also their respective proportion, or such part thereof, as has not been already paid of the interest or concern in shipping of the said [*testator*], deceased, pursuant to an agreement entered into between the said [E. G.] the elder, and [J. A.], his executors as aforesaid, and the said [P. M. G.], amounting, as appears by the said agreement, to the sum of 1575*l.*; and which agreement we do

and their unpaid proportion of the shipping concern, pursuant to an agreement between the exe-

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Ching,) upon this point. I confess, I think those decisions right. If there is a question of law, and the parties choose to refer that to the decision of an arbitrator, instead of the court, why may not he take all moral considerations into his judgment? If they refer to a person to decide all matters in difference according to law, and he means to decide according to law, and mistakes, the court will set that right. But if a distinct question of law, and nothing else, is referred, as there was in the case before Lord Rosslyn, and the parties choose to say, they will not take the decision of the court, but will take whatever an arbitrator shall say is the law between them, why may they not so agree? Lord Rosslyn thought, and very rightly, in my opinion, that if the parties mean by the reference to say, that A.'s law shall be the law between them, they are competent so to agree. Here every thing almost that could be referred, was matter of law. If, upon such a reference, the arbitrator chosen as being supposed abundantly competent to decide in matter of law, the award is to be questioned in this way, the decision amounts to nothing; and very little progress would be made towards the end of suits. The question is, whether, by the reference to arbitration, they mean to make the arbitrator *pro hâc vice* the lawgiver between them. Before I decide this motion, I wish to look at the case in the Court of King's Bench." On the next day his lordship said, "the case in the Court of King's Bench does not clash with what passed yesterday. Mr. Justice Grose puts it upon a principle, which I think clearly right; that the arbitrator meant to determine according to law, and was mistaken. Mr. Justice Lawrence also says, that, from his reasons, it clearly appears, that he has mistaken the law upon which he meant to proceed. They understood the arbitrator as stating upon the face of the award, that if his award is not according to law, he does not mean it shall be his award." And about nine months afterwards the Lord Chancellor incidentally took an opportunity of noticing this point; observing, that the decision of this

award, though not agreeable to law, cannot be therefore impeached.

cutors and P. M. G., (which agreement the arbitrators confirm) and also of such other part of shipping concern as is not included in agreement; and of the residue of testator's

direct, shall be finally confirmed; and also of such other part of the said shipping, or interest therein of the said deceased, as has not been included in the said agreement; and likewise of the rest, residue, and remainder of his estate, goods, chattels, and credits, not otherwise disposed of in or by his last will and testament, as the same shall be from time to time collected, gotten in, and received by the said executors, to the amount of one hundred and forty pounds, or upwards. And we do direct the said devisees and legatees

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court did not appear to be understood by those who cited it; and repeating his opinion, that, if questions of right and fact are referred to arbitration, the arbitrator is bound to decide according to law; but, if parties choose to refer a dry naked question of law to a man, as their mutual friend, to decide that question between them, instead of having the decision of a court of justice upon it, they are at liberty to do so: and this court will not interfere. *Young* v. *Walter*, 9 Ves. 364.

If an arbitrator, a barrister, reject a witness as inadmissible in point of law, the court will not set aside his award on that ground.

In a subsequent case in the Exchequer, a cause was referred from the assizes to the award of a barrister, who rejected a witness as inadmissible in point of law, the plaintiff having represented her as his wife for a long time, and with whom he had actually cohabited for many years, and by whom he had had several children; the arbitrator being of opinion that, under these circumstances, her evidence was not admissible in his favour. Although the point of law was doubtful, yet the court held, that as every thing, both of law and fact, must, in this instance, have been referred to the arbitrator, a person of competent judgment to decide, they would not disturb the award. *Campbell* v. *Twemlow*, 1 Price, 81. In *Steff* v. *Andrews*, 2 Mad. 6, Sir Thomas Plumer, Vice-Chancellor, held, that if a point of law be referred to the decision of an arbitrator, the parties are bound by his decision, whether right or wrong; unless fraud or corruption is imputable. See also to the same effect, *Wood* v. *Griffith*, Swans. 55. But in *Blennerhassett* v. *Day*, 2 Ball. and Bea. 120, Lord Manners, Lord Chancellor of Ireland, said, "when parties refer their legal rights to arbitration, the arbitrators must award according to law, else the award is not binding." However, as his Lordship did not refer to any case in support of this *dictum*, it cannot be considered of any authority, opposed, as it is, by the numerous cases referred to on this point.

If a point of law be referred to an arbitrator, the award is binding, whether right or wrong, unless fraud or corruption is imputable. Lord Manners's *dictum* to the contrary cannot, it seems, be supported.

An arbitrator is not bound by a rule of practice adopted by courts of law or equity, for general convenience; and therefore, where, on a

An arbitrator is not bound by a rule of prac-

respectively, and every other person claiming, or to claim by, from, or under them, or any of them, from time to time, when lawfully required, to sign, seal, execute, and deliver good and sufficient releases, acquittances, and discharges for all monies paid, or to be paid to them, by the said executors, by virtue of the aforesaid will, and of these presents. And we do moreover award, that the said [E. G.] the elder, and [J. A.], as executors as aforesaid, do and shall pay into the hands of and , public notaries, the sum of twelve pounds twelve shillings, at or before the delivery of this our award, for charges of

estate, when from time to time received, to the amount of 140*l.*:
that devisees and legatees, and those claiming under them, shall execute releases for monies paid:
that the executors shall pay expenses of reference:

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reference of a Chancery suit, and all matters in difference between the parties, the arbitrator had allowed interest (when it would not be allowed by a court of law or equity), the court refused to set aside the award on that ground. For the submission of the suit, and all matters in difference, gave the arbitrator an authority to adjust the account between the parties; and an authority to do that, carries with it an implied authority to allow interest, unless expressly excluded by the terms of the submission. It is this very circumstance, which, in many cases, makes a decision by an arbitrator preferable to that of the court; because he is not bound by the strict rules of practice, but may do full justice, according to the particular circumstances of the individual case. In re *Badger*, 2 Barnw. and Ald. 693. [And see *Prentice* v. *Reed*, 1 Taunt. 151.]

tice adopted by courts of law or equity.

However, it is certainly clear, that no court will permit directions in an award to stand, which are so contrary to the common rules of law, that the party, by his observance of them, would become a trespasser on the rights of others. 1 Roll. Abr. 249, (G.) *Ashton's* case, 1 Roll. Abr. 249, pl. 10; *Lynsey* v. *Ashton*, 1 Roll. Abr. 247, (E.) pl. 2. Godb. 255. *Alder* v. *Savill*, 5 Taunt. 454; *ante*, 14. Caldwell, 59. And where an arbitrator awarded a sum of money to one party, and having stated in his award the grounds on which he conceived it to be due, it appeared that part arose out of a transaction which, though the arbitrator did not seem to be aware that it was illegal, yet the court determined it to be so, and they set the award aside for so much. *Aubert* v. *Maze*, 2 Bos. and Pull. 371. But if an arbitrator chooses to put the law out of the question, and to award the payment of a conscientious demand, arising out of a transaction which he knows to be illegal, he may do so, if the fact do not appear on the face of the award. *Delver* v. *Barnes*, 1 Taunt. 48. And although an arbitrator

No court will sustain an award which would compel the party to become a trespasser on the rights of others;
or if the demand appear on the award to be founded on an illegal transaction.
But if the fact do not appear on the award, the arbitrator may award a conscientious demand, though illegal;

and that on performance of award, all differences between the parties shall cease.

the present reference: *And* upon performance of this our award, all differences and disputes in any wise subsisting by and between the said parties, or any of them, previous to the day of the date of the said recited indenture, touching the premises, shall utterly cease and determine. IN WITNESS, &c.

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or if the question be of mixed law and fact, he may allow a transaction apparently illegal.

on a question of mixed law and fact, has allowed transactions apparently illegal, as premiums of insurance on a voyage to an hostile port, the Court of Common Pleas will not, on that account, set aside the award. *Wohlenberg* v. *Lageman*, 6 Taunt. 254.

[The award of arbitrators, as to mere matters of fact within their province, is decisive, and no bill will lie in equity to set aside such an award. *Goodman* v. *Sayers*, 1 Jac. and W. 249. *Ed.*]

ON INTESTACY, OF DEBT, AND DISTRIBUTIVE SHARE.

AWARD *that an* INTESTATE *was indebted to C. D., one of his Children,* 139*l.* 6*s.*: *that C. D. is entitled to receive* 1400*l. as his distributive Share of the Residue, after paying all Debts, except the* 139*l.* 6*s.*, *and after paying two-thirds of that Sum: that a Chancery Suit shall cease: that the Administrators shall, on or before the* 21*st of February, pay C. D. the* 1400*l.*, *with Interest from December: that on Payment of the* 1400*l.*, *and Interest, C. D. shall, if required, execute to the Administrators a* GENERAL RELEASE, *at their Costs.*

Award that intestate was indebted to C. D., one of his children, 139*l.* 6*s.*

NOW KNOW YE, *That* I the said [*arbitrator*], having, &c. do make this my award in writing of and concerning (*a*) the matters so to me referred as aforesaid, in manner following; that is to say; I do award, adjudge, and (*b*) declare, that the said [*intestate*], deceased, who was the

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De premisis.

(*a*) The award need not state that it is made concerning the matters in difference, but it is prudent to state it. *Vide ante*, 18, (*c*).

An executor or administrator

(*b*) An executor or administrator may, as such, submit a matter in

father of the said [C. D.], [E. F.], and [G. H.], was, at the time of his death, justly indebted to the said [C. D.] in the sum of 139*l.* 6*s.* And I further award, adjudge, and declare, that the said [C. D.], as one of the three children of the said [*testator*], deceased, was and is justly entitled to have and receive the sum of 1400*l.* as his distributive share of the clear residue of the personal estate and effects of the said [*testator*], deceased, left after full payment of all the debts of the said [*testator*], deceased, except the

ON INTESTACY, OF DEBT, AND DISTRIBUTIVE SHARE.

that C. D. is entitled to receive 1400*l.*, as his distributive share of the residue, after paying all debts except the 139*l.* 6*s.*, and

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dispute between another and himself in right of his testator. Therefore, when the executor of a parson submitted to arbitration a dispute between the present incumbent and himself, as executor of the last incumbent, on account of some dilapidations of the parsonage, alledged to have been permitted by the default of the testator, and in his life, no objection was made to the want of power in the executor to submit. *Browne* v. *Meverell*, Dyer, 216, b. But if the arbitrator do not award as much as the executor or administrator would be entitled to at law, it will be a *devastavit* for the residue, and he must account for the deficiency to those who are interested in the effects of the testator or intestate. Com. Dig. *Administration*, (I. 1.) *Assets*, (C.) *ad finem*. 1 Bac. Abr. Gwill. ed. 207, 208. As if an executor submit to arbitration, and it be awarded, that for 70*l.* he release an obligation given to his testator, in 100*l.* for performance of covenants which were broken by the obligor, the 100*l.* shall be assets, for the submission is his own act. *Anon.* 3 Leon. 53. Wentw. Off. Ex. Wils. ed. 71. 160.

may, as such, submit to arbitration.

But if so much is not awarded as the executor would be entitled to at law, it will be a *devastavit* for the residue.

If a man, in the character of executor or administrator, expressly binds himself, his heirs, executors, and administrators, to perform an award to be made on the subject of disputes between his testator or intestate and another, and also concerning all other matters, accounts, &c. between the parties, or either of them, and the arbitrator award generally, that as executor or administrator, he shall pay a certain sum, he cannot, in an action on the bond, avail himself of a plea, "that he had fully administered, and that he had no assets of his testator or intestate at the time of the submission, or since:" the plea being inapplicable to the case; for the party, by such a submission, enters into a personal engagement to pay whatever the arbitrator shall direct, without any regard to the question of assets. *Barry* v. *Rush*, 1 Durnf. and East, 691. 5 Durnf. and East, 8.

A general submission by an executor or administrator, is an admission of assets, and he cannot afterwards plead *plene administravit*.

But it has been held, that the mere act of submission, as executor or administrator, is not, of itself, an admission of assets: and that if

But it has been held, that a submission to

ON INTESTACY, OF DEBT, AND DISTRIBUTIVE SHARE.

after paying two-thirds of that sum: that a Chancery suit shall cease: that the administrators shall, on or before 21st February,

said sum of 139*l.* 6*s.*; and after payment of two-thirds of the said last mentioned sum. AND I do further award, order, and direct, that the said suit shall be stayed, and no further prosecuted: *And* that the said [E. F.] and [G. H.], parties to this reference, and who are the administrators of the said [*intestate*], deceased, and who have received and possessed themselves of his personal estate and effects, shall and do, on or before the 21st day of February, 18 , pay to the said [C. D.] the said sum of 1400*l.*, to-

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an award by an administrator, is not an admission of assets, where the arbitrator only declared a debt to be due; and that a promise by an administrator to pay the sum to be awarded, is *nudum pactum*, if there be no assets.

It seems an action might be maintained on the verbal submission.

an executor or administrator, as such, submit to arbitration, and the arbitrator simply declare a debt due from the testator or intestate, specifying the amount without saying by whom it is to be paid, the executor or administrator is not precluded from the plea of "fully administered." And it was also held, that in such a case the plaintiffs cannot, in an action of assumpsit against the executor or administrator, in that character, give evidence of a verbal promise to pay whatever shall be found due; because, in the first place, the action seeks to recover the demand out of the testator's or intestate's effects, and if there be no assets, the personal promise by the representative is *nudum pactum*. *Pearson* v. *Henry*, 5 Durnf. and East, 6 Kyd, 39, 2d ed. But, it seems, that in an action against the defendant, independently of his character of executor, the plaintiffs might have recovered on his verbal submission. *Vide ante*, Vol. II. 633, *ultimo*. *Purslow* v. *Bailey*, 2 Ld. Raym. 1040. Wms. n. 1 Saund. 62, b, (5). However, the above case of *Pearson* v. *Henry*, is not to be understood as establishing a general principle: for where, under a reference between the plaintiff and the defendant, an administratrix, the arbitrator had ascertained the amount of the plaintiff's demand, and directed the defendant to pay it; and, on shewing cause against a rule for an attachment for non-performance of the award, it was urged, that the administratrix had no assets, and that the submission to an award by an administratrix was not an admission of assets, as was said in *Pearson* v. *Henry*; but Lord Kenyon, Chief Justice, said, the decision in *Pearson* v. *Henry* must be taken with reference to the facts of that case. There the arbitrator only ascertained the amount of the demand, without ordering the administrator to pay it: but here the arbitrator has awarded that the defendant, the administratrix, shall pay the plaintiff's demand. The submission to arbitration by the administratrix, was a reference not only of the cause of action, but also of the other question, whether or not the adminis-

If an arbitrator, under a reference between A. and B., an administratrix, award that B. shall pay a certain sum as the amount of A.'s demand, B. cannot afterwards object that she had no assets, but may be attached for non-payment: but it is no admission of assets in

gether with interest for the same, at the rate of 5*l.* per centum per annum, from the 21st day of December, 18 . And I further award, order, and direct, that upon payment of the said sum of 1400*l.*, with such interest as aforesaid, the said [C. D.] shall and do, if thereto required, execute unto the said [E. F.] and [G. H.], at their costs and charges, a general release of all claims and demands at law, and in

pay C. D. the 1400*l.*, with interest from December: that on payment of the 1400*l.* and interest, C. D. shall, if required, execute to administrators a ge-

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tratrix had assets. And as the arbitrator has awarded the defendant to pay the amount of the plaintiff's demand, it is equivalent to determining as between these parties that the administratrix had assets to pay this debt. The defendant therefore is concluded by this award, though it will not operate as an admission of assets in any other action to be brought by any other creditor. *Worthington* v. *Barlow*, 7 Durnf. and East, 453. [And see *Love* v. *Honeybourne*, 4 Dow. and Ry. 814; *Dowse* v. *Cox*, 3 Bing. 20; 10 J. B. Moo. 272. S. C.]. Therefore, wherever it is doubtful whether the executor or administrator will have sufficient assets to answer the sum likely to be awarded, it should be expressly declared, that he shall not be answerable any further than the assets extend.

favour of any other creditor.

When it is doubtful whether the executor will have sufficient assets, it should be declared that he shall not be personally liable.

A demand as executor or administrator is within a general submission to an award. Thus, in an action of debt upon an arbitration bond, it appeared, that the plaintiff and the defendant thereby submitted all matters in difference between them, or either of them. The arbitrators awarded 30*l.* to the plaintiff in full of all demands, either in her own right, or as executrix of her husband. And on demurrer, it was insisted, that the arbitrators had exceeded their authority. And Carth. 118, was cited, and the case put of a grant of *omnia bona et catalla sua*, which does not pass goods *en autre droit*. But the court held, that the submission was general enough: for the demand as executrix was a matter depending between them. And 1 Roll. Abr. 246, pl. 2, 3. 3 Buls. 65, are strong to this purpose. And though in Cro. Car. 433, [*quære Lumley* v. *Hutton*, Cro. Jac. 447,] there is an averment, that both sorts of demands were submitted, yet the court held it was not necessary. And the plaintiff had judgment. *Elletson* v. *Cummins*, 2 Str. 1144. So if a woman be indebted to J. S. in a certain sum, as administratrix to J. D., and she takes husband, and the husband and J. S. submit all matters between them to the award of W. N., he may make an award of this debt, which is due by the husband and wife, though it be due in the right of his wife, and as administratrix; for he is now chargeable by the intermarriage. *Lumley* v. *Hutton*, 1 Roll. Abr. 246, pl. 2. Cro. Jac. 447. Roll. Rep. 269. S. C. So upon such a sub-

A demand as executor or administrator is within a general submission to an award,

although it be by the husband of an executrix or administratrix.

ON INTESTACY, OF DEBT, AND DISTRIBUTIVE SHARE.

equity, upon or in respect of the personal estate of his late father. (*Add award as to costs.*) IN WITNESS, &c.

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neral release, at their costs.

mission, the arbitrator may make an award of a debt due to a woman as executrix. 1 Roll. Abr. 246, pl. 2. 3 Vin. Abr. 51.

A CREDITOR NOT A PARTNER WHEN SECURITIES WERE GIVEN.

AWARD *on an Agreement by a Deed of Composition between a Debtor, the Trustees, Creditors, and a Creditor, the Validity of whose Securities for a Debt was disputed, on the ground that he was a Partner when they were given, that the Matters in Difference should be referred to an Arbitrator, who should determine whether the Creditor was, or was not a Partner, when the Securities for the Debt were given; and whether he does, or does not still remain a Partner as to the other Creditors; and whether he is, or is not entitled in Law to recover on his Securities, before the other Creditors have been fully paid: and if it should be awarded that he is entitled to recover, then he is to receive the Benefit of the Composition Deed equally with the other Creditors: but if it should be awarded, that he is a Partner, or was so when the Securities were given, then he shall, when required, convey to the Trustees all his Interest in the Partnership Effects, and in the Premises covenanted by the Deed to be conveyed, to be held in Trust for the other Creditors:* THAT *the Creditor was not a Partner when the Securities were given, nor does still remain a Partner with respect to the other Creditors: and that he is entitled to recover on the Securities, before the other Creditors are fully paid.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*arbitrator*], of Lincoln's Inn, Barrister at Law, *send Greeting*. WHEREAS by a certain deed, bearing date on or about the day of March, 18 , and made between [A. B.] of, &c. of the first part; [*five trustees*] of, &c. trustees on behalf of themselves and the other creditors of the said [A. B.], of the second part; the several persons whose names are thereunto subscribed, and seals affixed, being creditors of the said [A. B.], of the third part; and [M. N.] of, &c. of the fourth part; it is, among other things, contained as follows; that is to say (*a*); *Whereas* the said [M. N.] claims, that the said partnership concern of [N. O.], [O. P.], and [A. B.], is indebted to him in the sum of 500*l.* or some other sum or sums of money secured to him by the bond of the said [N. O.], [O. P.], and [A. B.], some or one of them, or by some other security or securities; but it is contended on the part of the said trustees, and other the creditors of the said [A. B.], parties hereto of the second and third part, that he the said [M. N.] is not entitled to recover any part of the said debt or sum from the said partnership concern, until all the creditors of the said concern are paid off and satisfied their full and whole debts of twenty shillings in the pound; inasmuch as it appears to them, that the said [M. N.], at the time such security or securities were so given to him as aforesaid, was a partner in the said concern of [N. O.], [O. P.], and [A. B.], and still remains a partner therein, so far as respects the creditors of the said concern. *Now*, in order to settle such differences and disputes, it is hereby covenanted, declared, and agreed, by and between all and every the said parties hereto, and particularly the said [M. N.], for himself, his executors and administrators, doth covenant and agree to and with the said [*trustees*], as that the mat-

A CREDITOR NOT A PARTNER WHEN SECURITIES WERE GIVEN.

Recital of a deed of composition between a debtor, the trustees, creditors, and a creditor, the validity of whose securities for a debt was disputed on the ground that he was a partner when they were given;

(*a*) It is not uncommon to set the submission forth *verbatim*: sometimes it is the most simple and easy mode: but whenever the submission is unskilfully drawn, it is the most prudent course. [But the court cannot make the award consistent with the terms of the submission. *Hall* v. *Alderson*, 2 Bing. 476. A mis-recital of the submission does not vitiate the award. *Toll* v. *Dawson*, 1 Vent. 184. *Adams* v. *Adams*, 2 Mod. 169. *Ed.*]

Sometimes the submission is stated *verbatim*.

ters in difference shall be referred to an arbitrator, who shall determine whether the creditor was or was not a partner when the securities for the debt were given;
and whether he does or does not still remain a partner, as to the other creditors;
and whether he is or is not entitled in law to recover on his securities before the other creditors have been fully paid:
and if it should be awarded that he is entitled to recover, then he is to receive benefit of composition deed equally with other creditors:
but if it should be awarded, that he is a partner, or was so when the sureties were given, then he shall, when required, convey to trustees all his interest in the partnership effects, and in the premises covenanted by the deed to be conveyed to be held in trust for the other creditors:
agreement to abide by award, if made within three months, or as soon after as required.
Testatum.

trustees as aforesaid, that the said matters in difference between them shall be left to the award, order, and determination of [*arbitrator*], barrister at law; who shall award and determine whether the said [M. N.] was or was not a partner in the said concern of [N. O.], [O. P.], and [A. B.], at the time the said security or securities was or were given to him by them as aforesaid; and whether he does or does not still remain a partner therein, with respect to the other creditors of the said concern; and whether he is or is not entitled in law (*b*) to recover on the said security or securities before all the other creditors of the said concern have been paid their full and whole debts of twenty shillings in the pound: *and* in case it shall be awarded, that he the said [M. N.] is entitled so to recover on such security or securities, then he shall be entitled to receive the benefit and provisions of this deed equally with the other creditors of the said [A. B.]: *But* in case it shall be awarded that he is a partner in the said concern of [N. O.], [O. P.], and [A. B.], or that he was so at the time of taking such security or securities as aforesaid, then he the said [M. N.], his heirs, executors, and administrators, shall and will, whenever thereunto required by the trustees before-named, grant, convey, assign, and assure, by such conveyances, assignments, or other assurances as they shall require, unto them the said trustees, their heirs, executors, administrators, and assigns, all his interest in the said partnership estate, stock, and effects; and in all other the hereditaments and premises hereby covenanted to be assigned and conveyed; to be held by them upon the trusts hereinbefore declared, to and for the benefit of all other the creditors of the said [A. B.]: *And moreover*, that all and every the parties hereto shall and will stand to, abide by, and perform the award and determination of the said [*arbitrator*] in the matters aforesaid; *so as* the same be made in writing, and ready to be delivered to the parties in difference within three months from the day of the date hereof, or as soon after as they shall respectively require the same. Now KNOW YE, *That* I, the said [*arbitrator*], having taken

(*b*) As to the submission of a point of law, to the determination of an arbitrator, *vide ante*, 77, (*b*).

upon myself the burthen of the said reference, and having heard and duly considered the allegations, vouchers, proofs, and witnesses of the said parties; and the said parties not having hitherto required my award, do make this my award in writing, ready to be delivered to the said parties as soon as they shall require the same of and concerning the premises to me referred, as follows; that is to say; I *do* award and determine, that the said [M. N.] was not a partner in the said concern of [N. O.], [O. P.], and [A. B.] at the time the said security or securities, or any of them, were given to him by them as aforesaid, nor does still remain a partner therein, with respect to the other creditors of the said concern: And that he the said [M. N.] is entitled in law to recover on the said security or securities, before (and without waiting until) all the other creditors of the said concern shall have been paid their full and whole debts of twenty shillings in the pound. In witness, &c.

A CREDITOR NOT A PARTNER WHEN SECURITIES WERE GIVEN.

Award that the creditor was not a partner when the securities were given; nor does still remain a partner with respect to the other creditors: and that he is entitled in law to recover on the securities, before the other creditors are fully paid.

AWARD *that a* Partnership *be* Dissolved (*a*): *that A. B. shall receive to his own use, without C. D.'s Interference, all the Partnership Debts; and may use C. D.'s Name in any Action or Suit for Recovery thereof: that A. B. shall pay all Demands on the Copartnership; and indemnify C. D. therefrom, and from all Damages by reason of his Name being used: that C. D. shall, on A. B.'s request, deliver to him all Books, &c. in C. D.'s custody, relating to the Copartnership: and that A. B. shall pay, and C. D. accept, a certain Sum in full of all Demands.*

DISSOLUTION OF COPARTNERSHIP.

(*a*) On a dispute between two partners, all matters in difference were referred to arbitration in common form. The arbitrator, among other things, directed the partnership to be dissolved. On a motion to set aside the award, it was objected, that the arbitrator had exceeded his power. But the court held, that "when all matters in differ-

On a reference of all matters in difference between partners, the arbitrator may award a disso-

DISSOLUTION OF COPARTNERSHIP.

Award

NOW KNOW YE, *That* I the said [*arbitrator*], having, &c. do make this my award of and concerning the matters so referred to me as aforesaid, in manner following; that is to say; FIRST, I do award, order, and adjudge, that the said partnership shall be deemed and taken to have ended and been determined on and from the first day of November, 18 . SECONDLY, I do award, order, and direct, that the said [A. B.], his executors or administrators, shall and may demand, have, and receive to his or their own use, without the interference of the said [C. D.], all debts due and owing to the said copartnership, from any person whomsoever: *And* shall and may use the name of the said [C. D.], in any action or suit to be commenced for the recovery of any such debt or demand. THIRDLY, I do award, order, and direct, that the said [A. B.], his executors or administrators, shall and do bear, pay, and discharge all debts, demands, damages, and claims whatsoever, due or owing by, or which any person hath or can make against the said copartnership, or the said [C. D.], in respect thereof: *And* shall and do indemnify and keep harmless the said [C. D.] from and against all such debts, demands, damages, and claims; and from and against any loss or damage that may be incurred or sustained by the said [C. D.], by reason of his name being used in any such action or suit so to be commenced as aforesaid, in pursuance of the authority hereby given to the said [A. B.], his executors and administrators. FOURTHLY, I do award, order, and direct, that the said [C. D.] shall and do, at any

that partnership be dissolved:

that A. B. shall receive to his own use, without C. D.'s interference, all the partnership debts;

and may use C. D.'s name in any action or suit for recovery thereof:

that A. B. shall pay all demands on the copartnership;

and indemnify C. D. therefrom:

and from all damages by reason of his name being used:

that C. D. shall, on A. B.'s request, deliver

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lution of the partnership. So if it be between a master and apprentice, the arbitrator may award the indentures to be delivered up.

ence were referred, he had clearly a power to dissolve it. If a difference between a master and apprentice were referred, the arbitrator would have a power to order the indentures to be delivered up. And it being sworn, that at the trial, after the juror was withdrawn, and the rule of reference was thus generally drawn up, the plaintiff openly declared, he would not have it understood that the arbitrator had a power to dissolve the partnership; Lord Mansfield, Chief Justice, observed, that it is sufficient evidence out of his own mouth, that the dissolution of the partnership was then a matter in difference." *Green* v. *Waring*, 1 Wm. Bla. 475. And see 1 Roll. Abr. 242, (B.) pl. 2. 3 Vin. Abr. 42. [A partner cannot bind his co-partners in a submission to arbitration. *Stead* v. *Salt*, 3 Bing. 101. *Ed.*]

time or times, upon the request of the said [A. B.], his executors or administrators, deliver up to the said [A. B.], his executors or administrators, all and every the books, papers, and writings which may be in the custody, power, or possession of him the said [C. D.], in any wise relating to or concerning the business of the said copartnership. FIFTHLY, I do award, order, and direct, that the said [A. B.] shall and do, on the day of next, at the house of the said [C. D.], at aforesaid, pay unto the said [C. D.], his executors or administrators, the sum of pounds: *And* that the said [C. D.] shall and do accept and receive the same sum, in full satisfaction and discharge of all demands against the said [A. B.], until the day of the date of the said submission.

DISSOLUTION OF COPARTNERSHIP.

to him all books, &c. in C. D.'s custody relating to the co-partnership; and that A. B. shall pay, and C. D. accept, a certain sum in full of all demands.

AWARD *on an Agreement between an Appellant's Solicitor and the Solicitor for a Parish, that two Appeals* (*a*) *to the Quarter Sessions against two* POOR RATES, *and the* RENTAL *upon which the Premises was to be rated, should be referred to an Arbitrator, and who had under a Power enlarged the Time for making his Award,—That the first Rate was a fair Rate; that the Tenant was not thereby rated at a greater Sum than he ought to have been rated at; and that he was not aggrieved thereby: the same as to the second Rate: that there is now owing on both Rates a certain Sum: that the Tenant*

ON APPEALS AGAINST POOR RATES.

(*a*) An appeal at sessions against a poor rate may, with the consent of the parties interested, be referred by the justices to arbitration. *Rex* v. *Justices of Northampton*, Caldecott, 30. 1 Gwill. Bac. Abr. 203.

Poor rate appeal may be referred.

ON APPEALS AGAINST POOR RATES.

shall pay the same on a certain Day: that the Premises are of a certain Annual Value; and ought to be rated upon that Sum.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I [*arbitrator*] of, &c. *send greeting*. WHEREAS by a certain rate or assessment, made on the day of last, by the churchwardens and overseers of the poor of the parish of , in the county of , for the necessary relief of the poor of the same parish, for six months, commencing from the feast day of Easter, in the year of our Lord 18 , and which said rate was afterwards duly allowed by two of his Majesty's justices of the peace for the said county, [*tenant*], of the said parish of , farmer, was rated and assessed for the messuage, farm, and lands in his occupation in the said parish, with the appurtenances, in the sum of (seventy-five) pounds: *And* the said [*tenant*], conceiving himself aggrieved by the said rate, afterwards, at the General Quarter Sessions of the Peace, holden for the said county on the day of , 18 , appealed against the said rate, alleging, that he was assessed in respect of the said premises at a greater sum than, according to the fair, just, and proportionate value of the same premises, he ought to have been rated and assessed at. AND WHEREAS, by a certain other rate or assessment, made on the said day of , by the churchwardens and overseers of the poor of the said parish, for the necessary relief of the said poor, for six months, commencing from the feast day of Saint Michael, in the year of our Lord 18 , and which said last-mentioned rate was afterwards duly allowed by two of his Majesty's justices of the peace for the said county, the said [*tenant*] was also rated and assessed for the said premises, with the appurtenances, in the like sum of (seventy-five) pounds: *And* the said [*tenant*], conceiving himself aggrieved by the said last-mentioned rate, appealed against the same at the said General Quarter Sessions of the Peace, holden as aforesaid, alleging, amongst other things, that he was assessed in respect of the said premises at a much greater sum than, according to the fair, just, and proportionate value of the same premises, he ought to have been rated and assessed

Recital of the making and confirmation of a poor rate:

and appeal against the same at the sessions.

Recital of the making and confirmation of another poor rate on the same premises:

and appeal againstthe same at the sessions.

ON APPEALS AGAINST POOR RATES.

at. AND WHEREAS at the General Quarter Sessions of the Peace, holden in and for the said county of , on the day of last, the said several appeals were in the course of being duly heard and determined: but, on the motion of the counsel for the said [*tenant*], and by the consent of the counsel for the said churchwardens and overseers of the poor, the hearing of the said several appeals was respited until the then next General Quarter Sessions of the Peace for the said county. AND WHEREAS by a certain agreement, bearing date the day of last, under the hands of [*attorney*] (*b*), as solicitor for the said [*tenant*], and [*attorney*], as vestry clerk and solicitor for the said parish, the said solicitors being duly authorised for that purpose, did thereby agree on the part of their respective clients, that the said appeals, and also the said question as to the rental or sum upon which the said messuage, farm, and lands was to be rated to the poor's rates, should be referred to the award of me the said [*arbitrator*]; *so as* I should make my award or awards in writing on or before the (fourteenth) day of (February) then next: *With* power for me to enlarge the time for making my awards from time to time, as I should think necessary, to any period not extending beyond the (first)

Recital that the appeals were in the course of being heard, but the hearing was respited.

Recital of agreement between appellant's solicitor and the solicitor for the parish, that the appeals, and the rental upon which the premises was to be rated, should be referred to arbitrator:

so as he made his award in a given time;

with power to enlarge the time, not beyond a given day.

(*b*) It is generally prudent to have an express authority. But the assent of the attorney in a cause to a reference, by a rule of *nisi prius*, will bind the client; for, the employing an attorney in a particular suit, implies the client's assent that he may do every thing which the court may approve in the progress of the cause. Kyd on Awards, 45, 2d ed. And it seems, the same principle equally applies to a reference by the attorney of an appellant or respondent, at the quarter sessions.

The assent of the attorney in a cause to a reference, by a rule of *nisi prius*, will bind the client;

and it seems to be the same in a civil cause at the quarter sessions.

After an order of reference has been made, with the consent of counsel and attorney, the court will not set it aside on an affidavit by a party, stating, that he had expressly desired his attorney not to consent to any rule of reference, though the application be made before any step is taken by the arbitrator, excepting the appointment of a distant day for a meeting, in order to afford time for application to the court to set the rule aside. The defendant's remedy is by action against his attorney. There would be no end to these applications, if the court were to interfere; as such interference would lead to collusion; for, whenever a party did not like the prospect of the reference, he would say, that he had never given his attorney authority to refer.

The court will not set aside an order of *nisi prius*, referring a cause to arbitration, on an affidavit by the defendant, that he desired his attorney not to refer.

ON APPEALS AGAINST POOR RATES.

day of (June) then next. And whereas I the said [*arbitrator*], the arbitrator, in pursuance of the power to me given in and by the said agreement, did, on the (thirteenth) day of (February) last, by writing under my hand, duly enlarge the time for the making of my award between the said parties until the (thirty-first) day of (May) next; *As* by the said several assessments, appeals, agreement, and enlargement, reference being thereto respectively had, will more fully and at large appear. Now know ye, *That* I the said arbitrator, having taken upon myself the burthen of the said arbitration, and having fully heard, and maturely considered all the evidence produced before me by each of the said parties touching and relating to the matters in difference between them so referred to me as aforesaid, do make this my award in writing of and concerning the matters so to me referred as aforesaid, in manner following; that is to say; As to the first mentioned rate or assessment, I do award, that the same was and is a just, fair, and equal rate and assessment upon, for, and in respect of the said messuage, farm, and lands, with the appurtenances: *And* that the said [*tenant*] was not, nor is, in or by that rate or assessment, rated or assessed in respect of the said premises, at a greater sum than, accord-

Recital of arbitrator having enlarged the time for making his award.

Testatum.

Award that the first rate was a fair rate:

that the tenant was not thereby rated at a greater sum than he ought;

Filme v. *Delber*, 3 Taunt. 486. And in a subsequent case, the Court of Common Pleas again refused to set aside an order of *nisi prius*, referring a cause to arbitration, on an affidavit by the defendant, that she desired her attorney not to refer. 1 Chit. Rep. 193. (*a*). [But where one of the parties revoked the submission under a judge's order at *nisi prius*, before it had been made a rule of the court, it was held that the award could not be supported. *Clapham* v. *Higham*, 1 Bing. 87. And see *Aston* v. *George*, 2 B. & A. 395, and 1 Chit. 200, S. C. But a revocation of the authority, where the submission has been made a rule of court, is a contempt; and the party guilty of it, cannot come to the court for relief. *Harcourt* v. *Ramsbottom*, 1 Jac. & W. 51. *Ed.*]

Under an order of reference an attorney may extend the time for making an award.

So under an order of reference, an attorney may extend the time for making an award. Thus, where the defendants, in an extent in aid, withdrew their plea, and suffered judgment to be entered up on an agreement and order of reference thereon, to submit to arbitration the question of the amount of what was due to the prosecutor, provided the award should be made by a given time, and the arbitrator did not make his award till after the expiration of a further period, to which it had been agreed to extend the time, in consequence of the defendant's hav-

ON APPEALS AGAINST POOR RATES.

ing to the fair, just, and proportionate value of the same in the said parish, he ought to have been rated and assessed at: *And* that he was not, nor is, in any manner aggrieved by that rate or assessment. AND as to the last above-recited rate or assessment, I do award, that the same was and is a just, fair, and equal rate and assessment upon, for, and in respect of the said messuage, farm, and lands, with the appurtenances: *And* that the said [*tenant*] was not nor is, in or by that rate or assessment, rated or assessed in respect of the said premises, at a greater sum than, according to the fair, just, and proportionate value of the same in the said parish, he ought to have been rated and assessed at: *And* that he was not, nor is in any manner aggrieved by that rate. AND I do therefore award, that the churchwardens and overseers of the poor of the said parish, shall and do, at the General Quarter Session of the Peace for the said county, which shall be holden next after the making and publishing of this my award, move the court there to confirm and allow each of the said rates, so appealed against as aforesaid, as to the said messuage, farm, and lands, with the appurtenances; and to dismiss the said appeals. AND I do further find and award, that there is now justly due and owing to the said churchwardens and

and that he was not aggrieved thereby:

that the second rate was a fair rate:

that the tenant was not thereby rated at a greater sum than he ought;

and that he was not aggrieved thereby:

that a motion shall be made at the next quarter sessions, to confirm rates, and dismiss appeals:

that there is now owing on

ing delayed to furnish him with the name of a trustee, which was required to make part of the award, and the defendant's solicitor *afterwards* wrote a letter to the arbitrator, urging him to re-consider the subject of his allowances, which was refused, as the reference was considered to be closed:—it was held by the court, that under those circumstances, the delay in making the award had not invalidated it, as being made after the expiration of the arbitrator's authority; and therefore they refused to set aside the judgment, and the proceedings thereon, *and the award*, and allow the defendants to plead to the extent. Lord Chief Baron Richards said, the judgment and award must be taken together, or the judgment would not be regular. The question therefore is, whether this is a good award, or not. It is said it is not, because not made in time; that is, not by the first of September. It certainly was not, in fact, and therefore *primâ facie* it could not be good, unless, by the conduct of the parties, they have made it effectual by giving it their assent. I think it is quite clear that they have done so in this instance, under the circumstances of the case. Besides the other conduct of the defendants, all of which speaks a full assent to all that had taken place, there is the letter of their solicitor, written seven days after the 1st of September, requiring further matters to be

ON APPEALS AGAINST POOR RATES.

both rates, a certain sum: that tenant shall pay same on a certain day:

overseers of the poor of the said parish, for and on account of the said two several rates, the sum of 150*l.* And I do further award, order, and direct, that the said [*tenant*] shall and do, on the (twenty-eighth) day of March instant, between the hours of ten o'clock in the forenoon and twelve o'clock at noon, at and in the vestry room of the said parish, pay or cause to be paid the said sum of 150*l.*, for and on account of the said parish, to the then churchwardens and overseers of the poor of the said parish, or to some or one of them, or to such other person as they shall or may legally authorise to receive the same. And as to the rental or sum upon or at which the said messuage, farm, and lands should in future be rated, for and towards the relief of the poor of the said parish, I do find and award, that the said messuage, farm, and lands, with the appurtenances, at the times of the making and allowing the said several rates as aforesaid, were, and now are, of the full annual value of 1500*l.*: *And* that the said premises should and ought to be rated and assessed for and towards the relief of the poor of the said parish, upon, at, after, and according to that sum; the same being, in my judgment, at this time,

that premises are of a certain annual value;

and ought to be rated upon that sum.

It has been held, that, under an order of reference, a letter sent to the arbitrator by an attorney, at the request of his client, the defendant, after the time for making the award had expired, urging the arbitrator to reconsider the subject of his allowances, amounts to an express consent to enlarge the time, equal even to a rule of court.

still considered by the arbitrator, which he refuses to do. It is impossible not to hold that letter to be an assent to the enlargement of the time, as it was written with a view to the award which the arbitrator *was to* make. Mr. Baron Graham, concurring, said, this would be an exceedingly clear case in my view of it, if it had stood upon the letter of the defendant's solicitor alone, for that was an express recognition and assent, applying to all that had then taken place; and no subsequent verbal dissent could destroy the effect of that letter. They were of course aware of all that had been then done before the arbitrator, and that they had no new evidence to produce. Beyond all doubt, this amounted to an express consent to enlarge the time. And Mr. Baron Garrow said, I consider the letter an authority to the arbitrator, equal even to a rule of court. *The King* v. *Hill*, 7 Price, 644. Therefore, under an order of reference, although the time for making an award has expired, the authority of the arbitrator may be revived by an unstamped instrument. As to the general doctrine respecting the enlargement of the time for making an award, *vide ante*, Vol. II. 631-7.

The assent of a solicitor to a reference by rule of a court of equity,

the fair, just, and reasonable annual value of the said premises. As WITNESS my hand this day of , 18 .

ON APPEALS AGAINST POOR RATES.

Testimonium.

SIGNED AND PUBLISHED, by the above-named [*arbitrator*], as his award, (being first duly stamped (*d*),) in the presence of us,

Attestation.

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it has been holden, is not obligatory upon the client, without his actual concurrence; though in the same case it is admitted, that such a reference, by rule of *nisi prius*, will bind the client. *Colwall* or *Colwell* v. *Child*, 1 Cha. Rep. (104), 195, edit. 1693. 1 Cha. Cas. 86. S. C. But the authority of this case may now be doubted; 1 Gwill. Bac. Abr. 208, (*a*); for the character of a solicitor is equally known to the law as that of an attorney: their duty and their privileges are the same; the confidence reposed in them the same: they only differ in name, and practise in different courts.

It seems that the assent of a solicitor to a reference by rule of a court of equity, is obligatory on the client, without his concurrence; but it was formerly held otherwise.

[It would seem that a barrister has not the power to bind his client by his single assent. See *Ahitbol* v. *Benedetto*, 3 Taunt. 225. But see *Mole* v. *Smith*, 1 Jac. & W. 673. *Ed.*]

(*d*) *Vide ante*, 4, (*d*).

Stamp.

AS TO CHURCH RATES.

AWARD *that a certain Sum is due for* CHURCH RATES: *that the Amount shall be paid on a certain Day: that the Premises are of a certain Annual Value; and ought to be rated to the Church Rate upon that Sum.*

NOW KNOW YE, that I, the said arbitrator, having, &c. (*ut ante*, 100,) I do award, that there is justly due and owing from the said [*tenant*], for and in respect of the said messuage, farm, and lands, with the appurtenances, to the churchwardens and parishioners of the said parish, for and in respect of the church-rates of the said parish, the sum of pounds; that is to say; from Christmas, 18 , to Christmas, 18 . AND I do therefore award, that the said [*tenant*] shall and do, on the day of now next, at and in the vestry room of the said parish, pay, or cause to be paid, the said sum of pounds, for and on account of the said parish, to the said churchwardens of the said parish, or to some or one of them, or to such other person as they shall or may legally authorise to receive the same. AND as to the rental, or sum upon or at which the said messuage, farm, and lands, with the appurtenances, should in future be rated for and towards the rate, commonly called the church-rate, of the said parish, I do find and award, that the said messuage, farm, and lands, with the appurtenances, are of the full annual value of pounds: *And* that the said premises should and ought to be rated and assessed towards the said rate, upon, after, and according to that sum; the same being, in my judgment, at this time, the fair, just, and reasonable annual value of the said premises.

Award that a certain sum is due for church rates;

that the amount shall be paid on a certain day;

that the premises are of a certain annual value;

and ought to be rated to the church rate upon that sum.

OF PAYMENT UNDER RULE OF COURT.

AWARD *under a* RULE *of the Court of King's Bench, whereby it was ordered, that all Matters in Difference between a Plaintiff and Defendant, should be referred to Two Arbitrators, and such third Person as they should appoint, so as the Arbitrators, or any Two of them, made their Award on or before a certain Day, or on or before such extended Day as they should appoint, and the Court, or a Judge, order; and where the Time had been accordingly enlarged,* THAT *the Defendant shall pay the Plaintiff a certain Sum, which the Arbitrators find to be due: and that the Plaintiff shall pay the Costs of Reference.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, *We* [*three arbitrators*], of, &c. *send greeting.* WHEREAS by a rule of his Majesty's Court of King's Bench, at Westminster, made on next after , in the year of the reign of King George the Fourth, in a cause then depending in the said court, wherein [*plaintiff*] was plaintiff, and [*defendant*] was defendant; after reciting as therein was recited, *It was ordered,* upon hearing counsel for the plaintiff and defendant, that all matters in difference between the said parties should be referred to the award, order, arbitrament, final end, and determination of us [*two arbitrators*], and of such third person as we should, by memorandum under our hands, to be indorsed on the said rule, before we proceeded on the said arbitration, nominate and appoint, or of any two of us; *So as* we the said arbitrators, or any two of us, should make our award in writing of and concerning the premises in question, on or before the day of then next, or on or before such further or ulterior day as we the said arbitrators, or any two of us, should ultimately ap-

Recital of a rule of the Court of King's Bench, whereby it was ordered that all matters in difference between a plaintiff and defendant should be referred to two arbitrators, and such third person as they should appoint;

so as the arbitrators, or any two of them, made their award on or before a certain day,

or on or before such extended

day as they should appoint, and the court, or a judge, order:

point and signify in writing under our hands, to be indorsed on the said rule, and the said court, or one of the judges thereof, should order (*a*): *And* that the said parties should perform, fulfil, and keep such award, so to be made by us the said arbitrators, or any two of us: *And it was further ordered*, by and with such consent as aforesaid, that the costs of the said cause, and of the said reference, or in any manner relative thereto, should abide the event (*b*) of the said award or umpirage. And whereas we the said [*two arbitrators*], by virtue of the authority given us

that the parties should perform the award:

and that the costs of the cause and reference should abide the event of the award.

If an enlargement be made before the time limited, the court, or a judge, may assent afterwards; but it seems otherwise where an order is requisite.

(*a*) If the *approbation* of a court or a judge be requisite, and the arbitrators enlarge previous to the time limited, the subsequent assent of the court or judge is sufficient; but it is otherwise, if the arbitrators enlarge after the time limited. *Vide ante*, Vol. II. 632, (*b*). But under such a reference as the above, it seems that the order of the court or judge should be made before the expiration of the time limited.

When a cause is referred, and the costs are directed to abide *the event*, it means the *legal event*, and the party in whose favour the award is made, will be entitled to no more costs than if he had obtained a verdict to the same effect.

(*b*) When a cause has been referred by an order of *nisi prius*, or rule of court, and the costs are directed to abide *the event* of the award, that must be taken to mean the *legal event*; and the party in whose favour the award is made will be entitled to no more costs than if, the cause having proceeded to trial, he had obtained a verdict to the same effect as the award. Therefore, where a cause was referred by order of *nisi prius*, and the costs were to abide the event, the parties on one side were executors, and it was awarded that nothing was due from the other party to them, the master taxed that party his costs; but the court held, that the executors were not liable, since persons in that capacity would not have been liable to pay costs had a verdict passed against them, or had they been nonsuited. If they were, no executor would consent to a reference, as he would, in such case, be in a worse situation than if a verdict had been given against him. *Highman* and another, executors, v. *Hassell*, cited 3 Durnf. and East, 139. So where the costs were directed to abide the event of the award, and the arbitrator found no damages for the plaintiff, in an action of trespass to land, and directed both parties to pay their own costs, it was held that the plaintiff was not entitled to costs, because the legal event of the reference would not carry them. *Willis* v. *Osborne*, 1 Chit. Rep. 183. So where an action of trespass was brought for pulling down the plaintiff's gates, and assaulting him, and the defendants justified to all the counts, except one, under different rights of way, and pleaded not

OF PAYMENT UNDER RULE OF COURT.

by the said in part recited rule, did nominate and appoint the said [*third arbitrator*], to act with us in the said reference, before we proceeded on the same (*c*). AND WHEREAS the time limited for making our said award has been duly enlarged until (*d*) the day of instant: NOW KNOW YE, that we the said [*three arbitrators*], in pursuance of the said rule and reference, having heard the said parties by themselves and their attornies, their allegations and answers, touching and relating to the matters in difference between them, examined their wit-

Recital of appointment of third arbitrator.

Recital of due enlargement of time.

Testatum.

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guilty to the whole; and under a rule of *nisi prius*, the arbitrator awarded a right of way to the defendants different from any of those pleaded by them, and found *five shillings* damages to the plaintiff for the assault, as having been committed when the defendants were attempting to exercise a right of way negatived by the arbitrator; the court held, that the plaintiff can recover no more costs than damages; for the arbitrator's award is not tantamount to a judge's certificate, under the 22 and 23 Car. II. c. 9. *Swinglehurst* v. *Altham* and another, 3 Durnf. and East, 138. Therefore, where a verdict was taken for ten pounds in trespass, subject to an award of damages, and the costs were directed to abide the event, if the arbitrator find less than forty shillings damages, the plaintiff cannot have his costs, though it be also found that the trespass was wilful, and that the defendant should pay the plaintiff his costs: for costs being directed to abide the event, means the legal event; and the authority of a judge to certify for costs, under the 22 and 23 Car. II. c. 9, where the trespass is wilful, is not transferred to the arbitrator, under such a rule of reference. *Ward* v. *Mallinder*, 5 East, 489; And see 1 Chit. Rep. 185. [See also *Peters* v. *Anderson*, 1 Marsh. 238, *Oxenham* v. *Lemon*, 1 Dow. and Ry. 462. *Unsted* v. *Kidd*, 1 Chit. 527. *Highgate Arch Comp.* v. *Nash*, 2 B. and A. 597. *Mackintosh* v. *Blyth*, 1 Bing. 269. *Thompson* v. *Atkinson*, 6 B. and C. 193.]

An award is not tantamount to a judge's certificate for costs, under the 22 and 23 Car. II c. 9, where the trespass is wilful.

But where the verdict was taken at the trial, for a nominal sum, subject to an order of reference for ascertaining the amount of the damages, by which the costs were directed to abide *the event* of the award, and the arbitrator found a less sum to be due to the plaintiff than that for which the defendant was arrested; the court held, that the sum so

But under 43 Geo. III. c. 46, s. 3, for prevention of frivolous and vexatious arrests and suits, if

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(*c*) See the form, *ante*, Vol. II. 593.

(*d*) "Until" is, of itself, for this purpose, inclusive. *Vide ante*, Vol. II. 632, (*c*).

"Until."

OF PAYMENT UNDER RULE OF COURT.

Award that defendant shall pay plaintiff a certain sum, which arbitrators find to be due:

nesses upon oath, and maturely considered thereon, do award, order, adjudge, find, and determine of and upon the premises in manner following; that is to say; *We* do award and order that the said [*defendant*] shall and do pay to the said [*plaintiff*] at the house of Mr. , attorney at law, in , between the hours of and of the clock, in the noon of the day of this present month of , the sum of pounds of lawful money of Great Britain [and Ireland], which we find to be due and owing to the said [*plaintiff*], on a settlement of all

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the costs are directed to abide the event, and the arbitrator find a less sum to be due than that for which the defendant was arrested, it is a sum *recovered*, within the act;

but it is otherwise if the costs are not directed to abide the event.

found, and for which judgment was afterwards given, was to be considered as a sum *recovered*, within the meaning of the act 43 Geo. III. c. 46. s. 3. (for prevention of frivolous and vexatious arrests and suits,) so as to entitle the defendant to apply for costs. *Neale* v. *Porter*, and *Burns* v. *Palmer*, 2 Tidd's Prac. 998, 7th ed. In *Silversides* v. *Bowley*, 1 Moore, 92, and *Payne* v. *Acton*, 1 Brod. and Bing. 278, the costs were not directed to abide the event of the award, which is the reason why the defendants applied for costs, on the ground of the arrests being vexatious and malicious.

If a cause be referred, the costs to abide the event, and the arbitrators award that the plaintiff's original demand was under 40*s.* he is not entitled to costs; but on a suggestion, the defendant is.

Where a cause was referred to arbitration by rule of *nisi prius*, and the costs were to abide the event of the award, and the arbitrators awarded that the plaintiff's original demand was only thirty-seven shillings; the court held, that the plaintiff was not entitled to costs, any more than he would have been if, on a trial, he had recovered under forty shillings; but that on a suggestion to be entered by leave of the court, the defendant would be entitled to costs: *Butler* v. *Grubb*, cited 3 Durnf. and East, 139: for it appeared by the award, that the plaintiff's demand was originally under forty shillings, and he might have recovered it in a court of conscience. *Watson* v. *Gibson*, and *Harrison* v. *Slater*, 2 Tidd's Prac. 862, 7th ed.

If a cause be referred, the costs to abide the event, and the arbitrator award something to be done, which proves that the event in fact is in favour of the plaintiff, he is entitled to costs.

But where a cause is referred to arbitration, and the costs are to abide the event, and the arbitrator awards something to be done, which proves that the event in fact is in favour of the plaintiff, he is entitled to costs; although the arbitrator do not award a verdict to be entered for him. Thus, where an action of trover for corn, &c. having been referred to arbitration, with a proviso that the costs should abide the event; and the arbitrator awarded to the plaintiff a right of going into a certain barn to thresh his corn there, and directed that the incoming tenant should prepare the barns for the outgoing tenant, the plaintiff, and permit him to thrash his corn there, but omitted to give the plaintiff his costs, and directed a verdict to be entered for him, the court held,

accounts, dealings, and transactions between him and the said [*defendant*], and so referred to us as aforesaid. And we do also award and order, that the said [*plaintiff*] shall and do pay unto Mr. , of , upon the delivery of this our award, the sum of pounds, for the costs of us the said arbitrators in the said reference, the drawing of our award, and the stamps used for the same.

OF PAYMENT UNDER RULE OF COURT.

and that plaintiff shall pay costs of reference.

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that the plaintiff was entitled to his costs, they being to abide the event of the award, not of the action. *Anon.* 1 Smith's Rep. 426.

As the statute 11 Geo. II. c. 19. s. 22, gives double costs against a plaintiff in replevin only in three cases, namely, where he is non-suit, discontinues his action, or has judgment given against him; therefore, where in replevin, the cause not being then at issue, the parties agreed by bond to submit the question to arbitration, the costs to abide the event of the reference, and he awarded in favour of the defendant; it was held, that he was not entitled to double costs under the statute; for the plaintiff had neither become non-suit, nor discontinued his action, nor had judgment given against him. However, if the arbitrator had awarded a discontinuance, it would have been different; but that not being the case, the defendant is only entitled to single costs. *Gurney* v. *Buller*, 1 Barnw. and Ald. 670.

If a replevin cause be referred, the costs to abide the event, and the arbitrator award in favor of the defendant, he is not entitled to double costs under 11 Geo. II., c. 19. s. 22; otherwise, if a discontinuance had been awarded.

An arbitrator, under a rule of reference, which directs that the costs of the cause shall abide the event, has no power to direct those costs to be set off against the costs in a prior cause, although all matters in difference are referred. But the award is not to be set aside entirely, but only for that part which is incorrect. *Hunsted* v. *Kidd*, 1 Chit. Rep. 526. *Vide ante*, 14.

If a cause be referred, the costs to abide the event, the arbitrator cannot direct those costs to be set off against costs in a prior cause.

If a cause be referred to arbitration, under an order of *nisi prius*, but a verdict be nevertheless taken for the plaintiff for a certain sum, as a security for what shall be awarded to be paid to him, *and costs*, the arbitrator cannot award a sum to be paid to the plaintiff *without costs*; because, by the terms of the order, he was precluded from entering at all into the question concerning costs. Sayer's Law of Costs, 177. And where, by the rule of reference, the costs are to abide the event of the award, that includes the costs of the reference, as well as of the cause. *Wood* v. *O'Kelly*, 9 East, 436. But see *Bracher* v. *Cotton*, Barnes, 123. Pr. Reg. S. C. *semb. contra.* In that case, however, it does not appear that the costs were expressly directed to abide the event of the award. 2 Tidd's Prac. 863. See further as to costs, *ante*, 10, (*c*). [And *post*, 113 and 133.]

If a cause be referred, and a verdict for a sum as a security for debt *and costs*, the arbitrator cannot award a sum to the plaintiff *without costs*.

If by the rule, the costs are to abide the event, it includes both the costs of reference and of the cause.

OF PAYMENT UNDER RULE OF COURT.

IN WITNESS whereof we have hereunto respectively set our hands, the day of , 18 .

SIGNED AND PUBLISHED (being first duly stamped (*d*)), in the presence of

Stamp.

(*d*) *Vide ante*, 4, (*d*).

UNDER A RULE OF COURT; PAYMENT OF MONEY, AND COLLECTION OF PARTNERSHIP DEBTS.

AWARD *by Three Arbitrators, under a Submission by a* RULE *of the* COURT *of* KING'S BENCH, *in an Action brought by one Copartner against another, the Rule ordering that the Costs of the Cause should abide the Event of the Award, and that the Costs of the Reference should be in the Discretion of the Arbitrators;*—THAT *all Proceedings in the Cause shall cease: that the Defendant shall pay the Plaintiff a certain Sum: that the Defendant shall permit the Plaintiff to collect for their joint use, several Debts and Sums of Money, stated in the Award; that the Plaintiff do use his utmost endeavours to collect the same: that the Plaintiff may bring Actions in his own Name, or in the Name of the Defendant, or in their joint Names; but if the Plaintiff should bring any Action in the Defendant's Name, without his Consent, the Plaintiff shall indemnify the Defendant from all Costs, if the Action should fail: that the Plaintiff shall not compromise any Action without the Defendant's Consent: that the Plaintiff shall within one Month, after Payment of the Sum awarded, deliver to the Defendant an Account of the Residences of all Persons indebted to them; and give*

a Bond to the Defendant to use due Diligence in collecting the Debts; and give the Defendant an Account of his Proceedings; and as the Debts are received, pay the Defendant a Moiety: that each Party shall pay his own Costs of Reference: and that the Costs of the Award be paid equally.

UNDER A RULE OF COURT; PAYMENT OF MONEY, AND COLLECTION OF PARTNERSHIP DEBTS.

TO ALL TO WHOM THESE PRESENTS SHALL COME, *We*, [*three arbitrators*], of, &c. *send greeting*. WHEREAS an action was lately commenced in His Majesty's Court of King's Bench, in which [*plaintiff*], gentleman, was plaintiff, and [*defendant*], gentleman, was defendant: AND it was, by a certain rule or order of the said court, made on Wednesday next after fifteen days of the Holy Trinity, in the year of the reign of King George the Fourth, by the consent of Mr. , of counsel for the plaintiff, and Mr. , of counsel for the defendant, *Ordered*, that all matters in dispute between the said parties in the said cause should be referred to the award, order, arbitrament, final end, and determination of us the said [*three arbitrators*], or any two of us; *So as* we, or any two of us, should make and publish our award in writing under our hands, or the hands of any two of us, and ready to be delivered to the said parties in difference, or their attornies, or such of them as should desire the same, on or before the day of , then and now next ensuing; *And* that the said parties should perform, fulfil, and keep such award, so to be made by us the said arbitrators, or any two of us, as aforesaid: AND by the like consent, it was *further Ordered*, that the costs of the said cause should abide the event (*a*) of the said award; *And* that the costs of this present reference should be in the discretion of us, the said arbitrators, or any two of us; who should direct and award, by whom, and to whom, and in what manner, the same should be paid; *As* by the said rule or order, reference being thereto had, will, among other things, more fully appear. NOW KNOW YE, that we the said arbitrators, having taken upon ourselves

Recital of an action in K. B.

referred by rule of court to three arbitrators, or any two of them;

the costs of the cause to abide the event; the costs of reference to be in the discretion of arbitrators.

Testatum.

(*a*) *Vide ante*, 106, (*b*).

UNDER A RULE OF COURT; PAYMENT OF MONEY, AND COLLECTION OF PARTNERSHIP DEBTS.

the burthen of the said reference; and having examined, and duly considered the allegations, vouchers, proofs, and witnesses of the said parties respectively, *Do* make and publish this our award in writing, of and concerning the matters to us referred, as follows; that is to say; WE do award, order, and direct, that all proceedings in the said cause shall cease, and be no further prosecuted: AND that the said [*defendant*] shall and do pay to the said [*plaintiff*], at &c., between the hours of twelve at noon, and two in the afternoon, on the day of now next ensuing, the sum of pounds; which said sum of pounds, we do adjudge and declare to be justly due, from the said [*defendant*] to the said [*plaintiff*], for and upon the matters contained in the declaration in the said cause. AND we do further award, order, and direct that the said [*defendant*] shall and do permit and suffer the said [*plaintiff*] to collect, and receive for their joint use, the several debts and sums of money following; that is to say; (*state the names of the debtors, and the amount of their respective debts*). AND we do further award, order, and direct, that the said [*plaintiff*] do use his utmost endeavours to collect and receive the said several debts and sums of money accordingly; AND that the said [*plaintiff*] shall be at liberty to bring any action or actions, either in his own name, or in the name of the said [*defendant*], or in their joint names, as he may be advised, for the recovery of any debt or debts, sum or sums of money, hereinbefore mentioned; *But nevertheless*, if the said [*plaintiff*] should bring any action in the name of the said [*defendant*], without his consent for that purpose first had and obtained, that then the said [*plaintiff*] shall save harmless, and indemnify the said [*defendant*], from all consequences, costs, charges, and expenses, attending any such action, if the same should happen to fail, and be fruitless. AND we do further award, order, and direct, that the said [*plaintiff*] shall not compound, or compromise any action, to be brought for the recovery of any of the said debts or sums of money, without the consent of the said [*defendant*], in writing, for that purpose first had and obtained: AND that the said [*plaintiff*] shall, within one month after payment of

Award that all proceedings in the cause shall cease:

that the defendant shall pay the plaintiff a certain sum:

that the defendant shall permit the plaintiff to collect for their joint use, several debts and sums of money stated in the award:

that the plaintiff do use his utmost endeavours to collect same;

that the plaintiff may bring actions in his own name, or in the name of defendant, or in their joint names;

but if plaintiff should bring any action in defendant's name, without his consent, plaintiff shall indemnify defendant from all costs, if action should fail;

that plaintiff shall not compromise any action, without defendant's consent;

that plaintiff shall, within

the said sum of [*sum awarded*] pounds, deliver to the said [*defendant*], an account of the place of residence of all persons indebted to them, the said [*plaintiff*] and [*defendant*], so far as the said [*plaintiff*] shall know, or be able to ascertain the same; AND ALSO at his own expense, enter into, and deliver a bond to the said [*defendant*], in the penalty of . . . hundred pounds; with a condition thereunder written, for making the same void in case he the said [*plaintiff*] should use due diligence in collecting all outstanding debts due to them the said [*plaintiff*] and [*defendant*], or wherein they are jointly interested; AND shall give to the said [*defendant*], an account of his proceedings, from time to time, within six weeks after any request in writing so to do; AND shall also, from time to time, as the same debts are respectively received, pay to the said [*defendant*], one moiety thereof (all reasonable expenses touching the collecting and recovering of such debts, being first deducted). AND LASTLY, we do award, order, and direct, that each of the said parties shall and do bear and pay his own costs of this reference (*b*): AND that the costs of this our award, be paid in equal moieties between them. IN WITNESS, (*c*) &c.

one month after payment of sum awarded, deliver to defendant an account of the residences of all persons indebted to them; and give a bond to defendant to use due diligence in collecting debts; and give defendant an account of his proceedings;

and as debts are received, pay defendant a moiety:

that each party shall pay his own costs of reference; and that costs of award be paid equally.

(*b*) The rule of court on which the above award is made, having ordered that the costs of the cause should abide the event of the award, the arbitrators had no direct authority as to those costs, excepting so far as the subject of costs is affected by the sum awarded. That is the reason why those costs are not noticed in the award. But the arbitrators having awarded more than forty shillings to be due to the plaintiff, he was necessarily entitled to his costs in the cause. *Vide ante*, 106. (*b*). However, in such a case, the arbitrators sometimes order within what time the costs shall be paid, *ut post*, 115. But if the award be silent on this point, the party may recover his taxed costs, in the same manner as if he had obtained on a trial, an unconditional verdict for forty shillings. See further, *post*, 133, (*a*).

Where a rule of reference orders that the costs of the cause shall abide the event, those costs need not be noticed in the award.

(*c*) As to the stamp, *vide ante*, 4. (*d*).

Stamp.

UNDER ORDER OF NISI PRIUS; CAUSE TO CEASE, PAYMENT, AND GENERAL RELEASE.

AWARD *under an Order of* NISI PRIUS, *whereby a Cause, and all Matters in Difference between the Parties, were referred to one Arbitrator; the Costs of the Cause to abide the Event; and the Costs of the Reference to be in the Discretion of the Arbitrator:* THAT *the Cause shall cease: the Defendant to pay the Plaintiff a certain Sum, with Costs of Suit to be taxed; and a Moiety of the Expenses of the Award; as follows; Part of the Sum awarded, the Costs of the Cause, and the Expenses of the Award, on a certain Day; and the Residue of the Sum awarded on a subsequent Day: the Plaintiff, after Payment of the Residue, to execute a General Release to the Defendant, to the Date of the Order of* Nisi Prius, *if such Release, prepared at the Defendant's Expense, be left for the Plaintiff, at the Place of Payment: and that if Default be made in Payment of any Part of the Money, the Whole to become instantly due, and the Plaintiff may immediately recover the same.*

Recital of an order of *nisi prius*, whereby a cause, and all matters in difference between the parties, were referred to one arbitrator;

TO ALL TO WHOM THESE PRESENTS SHALL COME I, [*arbitrator*] of, &c., *send greeting.* WHEREAS at the sitting at *nisi prius*, holden at the Guildhall of the city of London, (*or* at Westminster Hall, in the great Hall of Pleas there, in and for the county of Middlesex) on the day of 18 , before the Right Honorable Sir Charles Abbott, Knight, Lord Chief Justice of our Lord the King, assigned to hold pleas before the King himself, a cause came on to be tried, wherein [*plaintiff*] was plaintiff, and [*defendant*], defendant; and thereupon, a certain order of *nisi prius* was then and there made; whereby *It was ordered* by the court, by and with the con-

UNDER ORDER OF NISI PRIUS; CAUSE TO CEASE, PAYMENT, AND GENERAL RELEASE.

tof the plaintiff and defendant, their counsel and attornies, that the said cause, and all other matters in difference between the parties, should be referred to the award, order, arbitrament, final end, and determination, of me the said [*arbitrator*]; *so as* I should make and publish my award in writing, of and concerning the premises in question, on or before the day of term, then and now next ensuing: *And it was also ordered,* by and with such consent as aforesaid, that the costs of the cause should abide the event and determination of the said award; *And* that the costs of the reference should be in the discretion of me, the said arbitrator; who should direct and award, by whom, and to whom, and in what manner the same should be paid. Now KNOW YE, that I the said [*arbitrator*], having taken upon myself the said reference, and having heard, examined, and considered the several allegations and proofs of the said parties respectively, *Do* in pursuance of the said reference, make and publish this my award in writing, of and concerning the matters so referred to me as aforesaid, in manner following; that is to say; I do award, order, and direct, that the said cause shall cease, and be no further prosecuted: AND that the said [*defendant*], his executors or administrators, shall and do pay to the said [*plaintiff*], his executors or administrators, or such other person as he or they shall or may lawfully authorise to receive the same, at the office of Messrs. , attornies at law in , the sum of pounds, together with the costs of the said cause (*a*), to be taxed by the proper officer of the said court; *And* the further sum of pounds, as and for one moiety of the expenses of this my award, at the times, and in manner following; that is to say; the sum of pounds, parcel of the said sum of [*sum awarded*] pounds, together with the costs of the said cause, and the said sum of [*expenses of award*] pounds, on the day of now next ensuing, between the hours of and in the noon of the same day; *And* the further sum of

the costs of the cause to abide the event;

and the costs of the reference to be in the discretion of the arbitrator. Testatum.

Award, the cause to cease:

defendant to pay plaintiff a certain sum, with costs of suit to be taxed;

and a moiety of the expenses of award; as follows;

part of the sum awarded, the costs of the cause, and the expenses of the award, on a certain day;

(*a*) *Vide ante*, 113, (*b*).

and the residue of the sum awarded on a subsequent day; plaintiff, after payment of residue, to execute a general release to defendant, to the date of the order of *nisi prius*, if such release, prepared at defendant's expense, be left for plaintiff at the place of payment: if default be made in payment of any part of the money, the whole to become instantly due, and plaintiff may immediately recover same.

pounds, residue of the said sum of [*sum awarded*] pounds, on the day of now next ensuing, between the same hours. And I do further award, order, and direct, that the said [*plaintiff*], his executors or administrators, shall and do, within days after payment of the said last mentioned sum, seal and deliver to the said [*defendant*], his executors or administrators, a general release of all actions, claims, and demands, to the day of the date of the said order of *nisi prius;* if such release, prepared at the expense of the said [*defendant*], his executors or administrators, should be tendered or left for him at the said office, on the said day of , at the time of payment of the said last mentioned sum of [*residue*] pounds. And lastly, I do award, order, and direct, that if default should be made in payment of all, either, or any part of the sums of money herein by me directed to be paid, at the place and times in that behalf appointed, then and thenceforth, all the monies herein directed to be paid, or so much thereof as shall then remain unpaid, shall become instantly due and payable; and the said [*plaintiff*] may immediately use such lawful means for obtaining payment thereof, as he might have done, if the whole of the said monies, or such part thereof as shall then remain unpaid, had been herein directed to be paid, on the day at which such default shall happen to be made, and such direction had not been complied with. In witness, &c.

AWARD *under an Order of* Nisi Prius, *that the Cause shall cease: that the Defendant shall pay the Plaintiff a Sum for holding over after the Expiration of the Lease; and a further Sum for Breach of Covenants, in not repairing* (*a*).

UNDER ORDER OF NISI PRIUS; PAYMENTS FOR HOLDING OVER, AND BREACH OF COVENANTS.

NOW KNOW YE, &c. I do award, order, and direct, that the said cause shall cease, and be no further prosecuted: AND that the said [*defendant*], his executors or

Award, cause to cease:

defendant to

(*a*) After an action brought for not repairing a house, &c., the matters in difference had been referred to arbitrators, who made their award upon a view of the premises, without calling the parties before them, the court set aside the award; and Lord Ellenborough, C. J., said, that though the premises might almost tell their own tale, yet there might be other facts which should be enquired into, such as payments by the party, or excuses for not repairing, &c. &c. *Anon.* 2 Chit. Rep. 44.

Award in an action for not repairing, made by arbitrators upon view of the premises, without calling the parties before them, will be set aside.

For want of notice of the meeting of the arbitrators, is a ground for setting aside an award. *Anon.* 1 Salk. 71.

Want of notice of meeting a ground for setting aside award.

Where a rule *nisi* had been obtained in a preceding term, to set aside an award, on the ground that the arbitrators having partly proceeded in the reference, declared they could take no further proceedings till some books of account had been looked into and examined; that the defendant, in consequence, left the meeting, considering the proceedings as suspended till those books had been referred to; but that the arbitrators afterwards examined a witness, in the absence of the defendant, when they determined that it was unnecessary to inspect the books, and signed a minute of their award, which was not executed till after the application to set it aside had been made:—on shewing cause against the rule, the court held, that at all events the defendant should have had notice that it was unnecessary for the arbitrators to have inspected the books, and that it was immaterial whether the award was actually executed before the application to set it

If arbitrators, having proceeded in a reference, inform the defendant present at the meeting, that they would suspend their proceedings till books of account had been referred to, and they afterwards make an award in his absence, without examining such

UNDER ORDER OF NISI PRIUS; PAYMENTS FOR HOLDING OVER, AND BREACH OF COVENANTS.

pay plaintiff a sum for holding over;

administrators, shall and do pay to the said [*plaintiff*], his executors, administrators, or assigns, on the day of now next, at , the sum of pounds, for the use and occupation, and as the value of the said premises, during the time the same were held over, after the expiration of the said lease; And the further sum of

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books, it is a good ground for setting aside the award.

aside was made; and the rule was made absolute. *Pepper* v. *Gorham*, 4 Moore, 148. The circumstance that the witness was examined in the absence of the party, was of itself a sufficient ground for setting aside the award. *Beddington* v. *Southall*, 4 Price, 235, 236; *ante*, 3, (*c*).

Arbitrator has power, subject to his discretion, to proceed *ex parte*, if one of the parties, or his solicitor on his behalf, will not attend a meeting, of which reasonable notice is given.

But if the parties neglect to attend in person, or by attorney, the arbitrator's appointment regularly notified to them, he may proceed *ex parte*. *Waller* v. *King*, 9 Mod. 63. Caldw. on Arb. 45. For every arbitrator has the power to proceed *ex parte*, if one of the parties, though duly summoned, will not attend, with a view to prevent justice, and defeat the object of the reference. The arbitrator is to judge of the discretion of it. *Wood* v. *Leake*, 12 Ves. 412. Nor is it any ground to set aside an award, that the solicitor takes upon him to say, he cannot attend at the time the arbitrators appoint. He must attend, if they make a reasonable appointment. *Fetherstone* v. *Cowper*, 9 Ves. 68. [And see *Harcourt* v. *Ramsbottom*, 1 Jac. and Walk. 51.]

On a reference by order of *nisi prius*, or by rule of court, a party may apply for a rule to shew cause why his opponent should not attend the arbitrators, or why they should not be directed to proceed *ex parte*.

In the case of a reference by order of *nisi prius*, or by rule of court, according to the statute, a party may apply for a rule to shew cause why his opponent should not attend before the arbitrators, or why the latter should not be directed to make their award without waiting for such attendance. Thus, where on a trial at *nisi prius* it appeared, that the demand of the plaintiff arose on a long and intricate account, which in almost every article was impeached by the defendant, who also set up a counter demand of the same nature, by way of set off; it was referred by consent; and the plaintiff neglecting to carry in his vouchers to the arbitrator, before the time limited for making the award, the time was several times enlarged, till at length the defendant, after upwards of six months delay on the part of the plaintiff, made an application to the court, on an affidavit, stating these circumstances, for a rule to shew cause why the plaintiff should not carry in his vouchers within a certain day, and why the time should not be further enlarged, or why, on the plaintiff's further default, the arbitrator should not be directed to proceed on hearing the defendant alone; the

UNDER ORDER OF NISI PRIUS; PAYMENTS FOR HOLDING OVER, AND BREACH OF COVENANTS.

pounds, for and on account of the breach of the said covenants, so far as concerns the supporting, maintaining, keeping, and leaving in repair the dwelling houses and other buildings erected and standing on the said premises, at the date of the said lease, or erected and built thereon during the said term for habitation.

and a further sum for breach of covenants in not repairing.

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rule was granted without hesitation; and the plaintiff, instead of shewing cause against it, peremptorily undertook to deliver in his vouchers within the time specified. *Hetley* v. *Hetley*, in the Exchequer, M. 1789, cited Kyd on Awards, 100.

Partiality and improper conduct in the arbitrator, in making his award, cannot be pleaded in bar to an arbitration bond; *Braddick* v. *Thompson*, 8 East, 344; *ante*, Vol. II. 574 (*e*); but is only a ground for an application to the court. *Ante*, Vol. II. 578. [And *post*, 143.]

Revocation of award by the death of arbitrator, or parties to the submission.

[If there is a verdict subject to a reference, and the arbitrator dies before making the award, the cause is again opened, and may be retried. *Harper* v. *Abraham*, 4 J. B. Moo. 3. The death of any party to the submission before the making of the award, is a revocation of the arbitrator's authority. *Cooper* v. *Johnson*, 2 Barn. and Ald. 394; and see *Toussaint* v. *Harton*, 1 J. B. Moo. 287. *Potts* v. *Ward*, 1 Marsh. 366. But where the reference was only to settle the amount of a verdict previously taken, the rule to set aside the award, on account of the death of one of the parties, was discharged. *Bower* v. *Taylor*, 7 Taunt. 574, n. And see *Rhodes* v. *Haigh*, 2 B. and C. 345; and Vol. II. 632, n. (*d*).

How submission by deed may be revoked.

A submission by deed, may, before award, be revoked by deed, with notice to the arbitrator, but not without. *Marsh* v. *Bulteel*, 5 B. and A. 107, *Vynior's case*, 8 Co. 162. *Trotter* v. *Moysey*, 1 Bing. 38, 7 Taunt. 406; and *Haggett* v. *Welsh*, 1 Sim. 134. *Ed.*]

UNDER ORDER OF NISI PRIUS : GOOD CAUSE OF ACTION BY EXECUTORS, PAYMENTS, &c.

AWARD *under an order of* Nisi Prius, *in a Cause wherein* EXECUTORS *were Plaintiffs, whereby all Matters in Difference between the Testator and the Defendant were referred to one Arbitrator; the Verdict to be entered as he should think fit; the Costs of the Cause, as to the Defendant, to abide the Event of the Award; the Costs of the Reference to be in the Discretion of the Arbitrator: the Order afterwards made a Rule of the King's Bench, and several Enlargements of the Time for making the Award, at Defendant's Request: the Plaintiffs delivered a Declaration* by the bye, *against the Defendant; and a Chancery Suit commenced by the Defendant against the Plaintiffs; and both Actions and Suit were pending at the time of the Reference:* —THAT *with respect to* the first Action, *the Plaintiffs had good Cause of Action against the Defendant, for principal Monies due to the Testator, which, with Interest to the* 10*th Dec. will amount to* 303*l.* 11*s.* 4*d.; for which Plaintiffs may enter a Verdict and sign Judgment, in case the Sums and Costs awarded be not duly paid; but to be a Security only for such Sums and Costs as shall not be duly paid, with the Costs of entering Verdict, &c. With respect to the Action* by the bye, *that the Plaintiffs had good Cause of Action against the Defendant for* 190*l.*, *due to the Testator: And with respect to the* Chancery Suit, *that the Defendant shall cause his own Bill to be dismissed, with Costs to be taxed, and to be paid by him to the Plaintiffs: that all Proceedings in Law and Equity shall be stayed: that the Defendant shall pay*

the Plaintiffs, at &c. the Sums awarded, with the Costs of both Actions, and the Costs of Reference and Award; the Costs to be taxed. Recital, *that pending the Reference, an Exchequer Bill for* 400*l. has been purchased with Defendant's Money, and deposited to abide the Event of the Award;* FURTHER AWARD, *that the Exchequer Bill, and all other Bills received in Exchange for it, be sold by* 10*th Dec.; the Produce, and all Benefit of the Bills, to be paid to the Plaintiffs, as Part of the Money and Costs awarded: That the Plaintiffs shall accept the Money and Costs awarded, in full of all Demands, as Executors, upon the Defendant.*

UNDER ORDER OF NISI PRIUS; GOOD CAUSE OF ACTION BY EXECUTORS, PAYMENTS, &c.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*arbitrator*], of Lincoln's Inn, in the county of Middlesex, barrister at law, *send greeting*. WHEREAS by a certain order, made at the sitting at *Nisi Prius*, held at Guildhall, in and for the city of London, on the day of , in the year of our Lord 18 , before the Right Honourable Sir Charles Abbott, Knight, Lord Chief Justice of our Lord the King, assigned to hold pleas before the King himself, in a certain cause then depending in the same Court, wherein [*plaintiffs*], executrix and executor of the last will and testament of [*testator*], deceased, were plaintiffs, and [*defendant*] was defendant: *It was ordered* by the Court, by and with the consent of the plaintiffs and defendant, their counsel and attornies (amongst other things), that all matters in difference between the said [*testator*], the testator (*a*), and the defendant, both at law and in equity, should be referred to the award, order, arbitrament, final end, and determination of me the said [*arbitrator*]; *And* that a verdict should be entered, as I should think fit; *so as* I should make and publish my award in writing, of and concerning the premises in question, on or before the second day of Easter Term then next

Exordium.

Recital of an order of *nisi prius*, in cause wherein executors were plaintiffs,

whereby all matters in difference between testator and defendant were referred to one arbitrator;

verdict to be entered as he should think fit; so that, &c.

(*a*) *Vide ante*, 88, (*b*).

UNDER ORDER OF NISI PRIUS; GOOD CAUSE OF ACTION BY EXECUTORS, PAYMENTS, &C.

ensuing: *And* that the said parties should and would perform, fulfil, and keep such award, so to be made by me the said arbitrator, as aforesaid: *And* that the costs of the cause, as to the defendant (*b*), should abide the event and determination of my said award: *And* that the costs of the reference should be in the discretion of me, the said arbitrator, who should direct and award, by whom and to whom, and in what manner, the same should be paid. *And* which said order was afterwards entered and made a rule of His Majesty's Court of King's Bench. AND WHEREAS, at the request of the said defendant and his solicitors, and in order to give the said defendant time to produce evidence in support of his case, the time for making this my award, has been, by certain rules or orders of the said Court of King's Bench, from time to time, duly enlarged. AND WHEREAS, by a certain other rule or order of the said Court of King's Bench, made on Thursday after the Feast of St. Martin now last past, *It was ordered*, that the time limited for me the said arbitrator, making my award between the said parties, should be enlarged until (*c*) the last day of the then and now next term. AND WHEREAS the said [*plaintiffs*], as such executrix and executor as aforesaid, delivered a declaration by the bye (*d*), in the said Court of King's Bench, against the said [*defendant*], for the recovery of other money, alleged to be due and owing by the said [*defendant*] to the said testator. AND WHEREAS also a certain suit in the Court of Chancery was commenced by the said [*defendant*], against the said [*plaintiffs*], as such executrix and executor, as aforesaid: *And* which said two several actions, as well as the said suit in Chancery, were pending at the time of the making of the said first mentioned order. NOW KNOW YE, that I, the said arbitrator, having taken upon myself the burthen of the said reference; and having heard, examined, and

parties to perform award:

costs of cause, as to defendant, to abide the event of award:

costs of reference to be in discretion of arbitrator.

Order afterwards made a rule of K. B.

Recital of several enlargements, at defendant's request.

Recital of last enlargement.

Recital that plaintiffs delivered a declaration *by the bye* against defendant:

that a chancery suit was commenced by defendant against plaintiffs:

and that both actions and suit were pending at the time of reference.

Testatum.

(*b*) See *Highnam* and another, executors, v. *Hassell*, *ante*, 106, (*b*).

(*c*) *Vide ante*, 43, (*b*).

By the bye.

(*d*) A declaration *by the bye*, is at the suit of a *different* plaintiff, or of the *same* plaintiff for a *different* cause of action. 1 Tidd's Prac. 422. 429, 7th ed.

UNDER ORDER OF NISI PRIUS; GOOD CAUSE OF ACTION BY EXECUTORS, PAYMENTS, &c.

duly considered the allegations, vouchers, proofs, and witnesses of the said parties respectively, *Do* make and publish this my award in writing, of and concerning the matters to me referred as aforesaid, as follows; that is to say; *With respect* to the said first mentioned action, wherein the said order and rules were made, I do award, adjudge, and declare, that the said [*plaintiffs*], as such executrix and executor as aforesaid, had good cause of action against the said [*defendant*], for divers principal sums of money bearing interest, due from him to the said testator, which with interest thereon, calculated up to the tenth day of December now next ensuing, do and will amount to the sum of 303*l.* 11*s.* 4*d.*; and for which said sum of 303*l.* 11*s.* 4*d.*, they the said [*plaintiffs*] may cause a verdict to be entered in the said first mentioned action, and sign judgment thereon against the said [*defendant*], in case the several sums of money, and costs herein by me directed to be paid by him to them, shall not be duly paid at the time and place hereinafter appointed for that purpose; *But* such verdict and judgment shall stand, and be a security only for so much of such sums and costs as shall not be duly paid, together with the further costs of entering the said verdict, and signing judgment thereon, and consequent thereto: *And with respect* to the said other action, by the bye, I do award, adjudge, and declare, that the said [*plaintiffs*], as such executrix and executor as aforesaid, had good cause of action against the said [*defendant*], for the sum of 190*l.*, due and owing by him to the said testator: *And with respect* to the said suit in Chancery, I do award, order, and direct, that the said [*defendant*] shall forthwith cause his own bill therein to be dismissed, with costs to be taxed by the proper officer of the said Court of Chancery; and which costs I direct to be paid by him the said [*defendant*] to the said [*plaintiffs*] at the time and place hereinafter mentioned: And that all proceedings, both in law and equity, shall be forthwith stayed, and no further prosecuted, except as to the entering the said verdict, and the proceedings consequent thereupon. And I do award, order, and direct, that the said [*defendant*] shall and do pay to the said [*plaintiffs*], as such executrix and executor as aforesaid, at the chambers

Award, with respect to the first action, that plaintiffs had good cause of action against defendant, for principal monies due to testator, which, with interest to 10th Dec. will amount to 303*l.* 11*s.* 4*d.*; for which plaintiffs may enter a verdict and sign judgment, in case the sums and costs awarded be not duly paid;

but to be a security only for such sums and costs as shall not be dulypaid, with the costs of entering verdict, &c.

With respect to the action *by the bye*, that plaintiffs had good cause of action against defendant for 190*l.*, due to testator:

and with respect to Chancery suit, that defendant shall cause his own bill to be dismissed, with costs to be taxed, and to be paid by him to plaintiffs;

that all proceedings in law and equity shall be stayed;

that defendants shall pay plain-

tiffs, at, &c. sums awarded; with costs of both actions; and the costs of reference and award; costs to be taxed.

of Mr. , their attorney in the said action, situate in Lincoln's Inn, aforesaid, on the tenth day of December now next ensuing, between the hours of twelve at noon and two in the afternoon, as well the said sum of 303*l.* 11*s.* 4*d.*, as the said sum of 190*l.*, together with the costs of both the said actions, and also the costs of the said reference, and of this my award: such costs to be in the mean time taxed by the proper officer of the said Court of King's Bench.

Recital that pending reference, exchequer bill for 400*l.* has been purchased with defendant's money, and deposited to abide the event of award.

AND WHEREAS pending the said reference, a certain Exchequer bill for the sum of 400*l.*, has been purchased with the money of the said [*defendant*], and deposited with certain bankers, to abide the event of this my award.

Further award, that exchequer bill, and all other bills received in exchange for it, be sold by 10th Dec.; produce and all benefit of the bills, to be paid to plaintiffs, as part of the money and costs awarded; that plaintiffs shall accept money and costs awarded in full of all demands, as executors, upon defendants.

NOW I DO FURTHER AWARD, order, and direct, that the said Exchequer bill, and all other Exchequer bills (if any), which may have been received in exchange for the same, be sold, and converted into money, on or before the said tenth day of December: *And* that all money produced by such sale, and also all money and benefit that may have been received and arisen upon all such Exchequer bills, as well by way of interest as otherwise, be paid to the said [*plaintiffs*], as such executrix and executor as aforesaid, on the said tenth day of December, at the place aforesaid, as a part of and in reduction of the several sums of money and costs herein by me directed to be paid by the said [*defendant*], as aforesaid. AND I DO FURTHER AWARD and order, that the said [*plaintiffs*] shall and do accept the said several sums of money and costs herein by me awarded to be paid, in full satisfaction and discharge of all demands by them, as such executrix and executor as aforesaid, upon the said [*defendant*]. IN WITNESS, &c.

AWARD *under an Order of* Nisi Prius *at the Assizes, whereby it was ordered that a Verdict should be entered for the Plaintiff, Damages,* 30*l.*, *Costs,* 40*s.*, *subject to a Reference of all Matters in Difference: that the Costs of the Cause should abide the Event of the Award: that the Costs of the Reference should be in the Discretion of the Arbitrator: and that the Arbitrator might direct an Application to the Court to enlarge the Time; and the Time for making the Award was enlarged by the Court:* THAT *the Verdict found for the Plaintiff, do stand: that the Defendants pay the Plaintiff the Costs of the Reference and Award: and that the Defendants have no Claim on the Plaintiff in respect of a Vessel mentioned in the Pleadings.*

UNDER ORDER OF NISI PRIUS; VERDICT TO STAND, PAYMENT OF COSTS OF REFERENCE, &c.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*arbitrator*], of the Inner Temple, barrister at law, *send greeting*. WHEREAS a certain action at law, depending in his Majesty's Court of Common Pleas, wherein [*plaintiff*], was the plaintiff, and [*defendant*] the younger, and [*other defendant*], were the defendants, came on to be tried at the assizes holden at , in and for the county of , on the day of July, in the year of the reign of his present Majesty King George the Fourth, before the Right Honorable Sir Charles Abbott, Knight, Lord Chief Justice of our said Lord the King, assigned to hold pleas before the King himself, and the Honorable Sir James Burrough, Knight, one of the Justices of our said Lord the King, of his Court of Common Pleas, at Westminster; Justices of our said Lord the King, appointed to take the assizes for the said county of , according to the form of the statute in that

Exordium.

Recital of an order of *nisi prius* at the assizes, whereby it was ordered that a verdict should be entered for the plaintiff, damages 30*l.*, costs 40*s.*, subject to a reference of all matters in difference;

UNDER ORDER OF NISI PRIUS; VERDICT TO STAND, PAYMENT OF COSTS OF REFERENCE, &c.

case made and provided; *It was ordered* by the said justices, in open court, by and with the consent of the said parties, their counsel and attornies, that a verdict should be entered for the plaintiff, damages thirty pounds, costs forty shillings; *But* that such verdict should be subject to the award, order, arbitrament, final end, and determination of me the said [*arbitrator*]; to whom it was thereby referred to settle all matters in difference between the said parties (*a*); and to order and determine what I the said arbitrator should think fit to be done by either of them, respecting the matters in dispute; who agreed to be bound and concluded by such determination, and to remain contented and satisfied therewith; *so as* I the said arbitrator, should make and publish my award in writing, concerning the premises, on or before the second day of the then next Michaelmas Term. AND *it was also ordered*, that the costs of the said cause should abide the event of my said award: *And* that the costs of this present reference should be in the discretion of me the said arbitrator, who might direct and award to, and by whom, and in what manner, the same should be paid. AND *it was also ordered*, that I, the said arbitrator, might direct that an application (*b*),

so as, &c.

that the costs of the cause should abide the event of the award; that the costs of the reference should be in the discretion of the arbitrator;

If by the associate's mistake, the order mentions all matters in difference *between the parties*, instead of *in the cause*, it cannot be amended.

(*a*) If all matters in difference *in the cause*, are agreed to be referred, and the associate, by mistake, draws up the order of reference generally, as to all matters in difference *between the parties*, it cannot be amended; but the parties must go down to another trial. *Rawtree* v. *King*, 5 Moore, 167. [If the parties have acted under an order drawn up, the court will not allow it to be amended, although contrary to the note signed by counsel. *Pearman* v. *Cotter*, 2 Chit. 29. And see *Matson* v. *Trower*, 1 Ry. & Moo. 17. *Ed.*]

Where arbitrator has power to make "an application" to the court for enlargement of the time for making his award, he may make several applications, and is not *functus officio* at the expiration of the time granted by the first enlargement.

(*b*) Where the submission expressed that the arbitrator should be at liberty to make "another" application to the Court, for an enlargement of the time in which he was to make his award; many applications had been made, and enlargements accordingly: and the question, upon an application to set aside the award, was, whether "an application" was to be construed to mean only *one* application, or whether several applications, from time to time, could be said to be within the meaning of the terms of the submission. Mr. Justice Dampier said he was inclined to the latter opinion; but wished the point to be considered, and the construction settled. In support of the award, it was

UNDER ORDER OF NISI PRIUS; VERDICT TO STAND, PAYMENT OF COSTS OF REFERENCE, &C.

should be made to the said Court of Common Pleas, to enlarge the time for making my said award, in case I, the said arbitrator, should think fit so to do. AND WHEREAS by a certain other rule or order, made on the day of November, in Michaelmas Term, in the year of the reign of his said Majesty, agreeably to the power by the several parties to the said cause for that purpose given; and on hearing counsel for me the said arbitrator, *it was* by the said Court of Common Pleas *ordered*, that the time for me the said arbitrator to make my award, should be, and the same was thereby enlarged, until the day of this instant, November. NOW KNOW YE, that I the said arbitrator, having taken upon myself the burthen of the said reference; and having heard, and duly considered the allegations, vouchers, proofs, and witnesses of the said parties, *Do* make and publish this my award in writing, of and concerning the matters to me referred, as follows; that is to say; I do award and order, that the verdict so found for the said plaintiff, as aforesaid, shall stand and be in force: AND that the said defendants shall and do pay to the said plaintiff the costs of this reference and award, to be taxed by the proper officer of the same Court. AND I do further award and adjudge, that the said defendants have not any claim or demand upon the said plaintiff, in respect of, or in any manner relating to, the vessel called the in the pleadings of the said action mentioned. IN WITNESS, &c.

and that the arbitrator might direct an application to the court to enlarge the time.

Recital of enlargement by the court, of the time for making the award.

Testatum.

Award that verdict found for plaintiff do stand: that defendants pay plaintiff costs of reference and award; that defendants have no claim on plaintiff in respect of a vessel mentioned in pleadings.

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stated that it had been decided in the Common Pleas, (*Payne* v. *Deakle*, 1 Taunt. 509; *Barrett* v. *Parry*, 4 Taunt. 658; *ante*, Vol. II. 632, (*d*)), that where the submission was, that the arbitrator might apply to enlarge the time for making his award, it meant that he might do so from time to time. But Mr. Justice Dampier wished the point to be settled in the Court of King's Bench, and therefore granted a rule *nisi*, which was afterwards discharged without costs. *Anon.* 2 Chit. Rep. 45.

UNDER ORDER OF NISI PRIUS IN C. P. PLAINTIFF NO CAUSE OF ACTION.

AWARD *under an Order of* Nisi Prius, *in the Common Pleas, whereby the Jury was directed to find a verdict for the Plaintiff, for Pounds Damages, subject to a Reference of all Matters in Difference; so as the Arbitrator made his Award by a given Day, or any other Day, to which he should enlarge the Time: and it was ordered, that the Arbitrator might examine the Parties upon Oath; and that the Parties and Witnesses might be sworn before a Judge of the Court: that the Parties should produce before the Arbitrator, all Books, &c.; that the Costs of the Suit should abide the Event of the Award, and the Costs of Reference be in the Arbitrator's Discretion:—*That *the Plaintiff had no Cause of Action: that instead of the Verdict and Damages for the Plaintiff, a Verdict be entered for the Defendant; and that the Plaintiff and Defendant shall bear their own Costs of the Reference, and of the Award.*

Exordium.

Recital of an order of *nisi prius* in C. P. whereby the jury was directed to find a verdict for the plaintiff for pounds damages, subject to a reference of all matters in difference;

TO ALL TO WHOM THESE PRESENTS SHALL COME. I, [*arbitrator*] of, &c. *send greeting*. WHEREAS at the sitting at *nisi prius* after Term last, holden at the Guildhall of the city of London, (*or* at Westminster, in the great hall of pleas there in and for the county of Middlesex,) on the day of , in the year of our Lord 18 , before the Right Honourable Sir Robert Dallas, knight, Lord Chief Justice of his Majesty's Court of Common Pleas, at Westminster, a certain order was made, in a certain cause then depending in the same Court, wherein [*plaintiff*] was plaintiff, and [*defendant*] was defendant; whereby (amongst other things) *It was ordered* by the Court, by and with the consent of all parties, their counsel, and attornies, that the jury should find a verdict for the plaintiff for pounds damages, sub-

UNDER ORDER OF NISI PRIUS IN C. P. PLAINTIFF NO CAUSE OF ACTION.

ject to the award, order, arbitrament, final end, and determination of me the said [*arbitrator*], to whom all matters in difference between the said parties were thereby referred; *so as* I the said arbitrator did and should make and duly publish my award in writing, of and concerning the matters referred, ready to be delivered to the said parties, or to either of them requiring the same, on or before the day of Term next ensuing the day of the date of the said order; or on or before any other day (*a*) to which I the said arbitrator should enlarge the time for making my said award: *And*, by the like consent, *it was also ordered*, that I the said arbitrator should, and might be at liberty, if I should think fit, to examine the parties to that suit upon oath; and for that purpose, the said parties, and also the witnesses to be examined before me the said arbitrator, touching the matters referred, should and might be sworn before the Right Honourable the Lord Chief Justice, or some other Judge of his Majesty's said Court of Common Pleas: *And* that the said parties should produce before me the said arbitrator, all books, deeds, papers, and writings whatsoever, in their, or either of their custody or power, relating to the matters in difference: *And*, by the like consent, *it was also ordered*, that the costs of the said suit should abide the event of the said award, so to be made and published as aforesaid: *And* that the costs of the reference should be in the discretion of me the said arbitrator; *As* by the said order more fully appears. NOW KNOW YE, that I the said [*arbitrator*], the arbitrator aforesaid, having taken upon me the burthen of the said arbitrament; and having heard, examined, and considered the allegations and proofs of both the said parties, concerning the premises, *Do* thereupon, make this my award in writing concerning the same, in manner and form following; that is to say; I do award, adjudge, and determine, that at the time of commencing the said suit, the said [*plaintiff*] had no cause of action whatever against the said [*defendant*], in respect of the

so as the arbitrator made his award by a given day,

or any other day to which he should enlarge the time:

that the arbitrator might examine the parties upon oath; and that the parties and witnesses might be sworn before a judge of the court:

that the parties should produce before arbitrator all books, &c.

that costs of suit should abide event of award; and costs of reference be in arbitrator's discretion.

Testatum.

Award,

that the plaintiff had no cause of action:

(*a*) If an arbitrator has power to enlarge the time for making his award to any other *day*, the court will expound it to mean, to any other *days*. *Vide ante*, Vol. II. 632, (*d*); *ante*, 125, (*b*).

As to enlargement of time, *day* means *days*.

that instead of verdict and damages for plaintiff, a verdict be entered for defendant: and that plaintiff and defendant shall bear their own costs of reference and award.

said matters to me referred. And I do thereupon award, order, and direct, that instead of the said verdict and damages, so found for the said plaintiff, a verdict in the said action be entered for the said [*defendant*]. And I do further award, order, and direct, that the said [*plaintiff*] and [*defendant*] shall respectively bear and pay their own costs of the reference, and of this my award. In witness, &c.

UNDER JUDGE'S ORDER ON AGREEMENT, OF RIGHT TO FURNITURE AND DAMAGES.

AWARD *after an Action against a Sheriff, on a Reference of all Matters in Difference between the Parties, by a* Judge's Order, *pursuant to the Terms of an* Agreement *between the Parties, set forth in the Order, and reciting, that the Plaintiff claims a House, Furniture, &c. under a Bill of Sale, and an Assignment of the Lease: that another claims the Value of the Furniture under a* fi. fa. *on which the Furniture has been seized by the Sheriff, who has had joint Possession with the Plaintiff, being indemnified by Claimant: and the Agreement being that the Plaintiff shall have entire Possession; and the Claims referred to an Arbitrator; if he should determine that the Claimant is entitled to the Value, the Plaintiff undertakes to pay the same; if he should determine that the Plaintiff is entitled, the Arbitrator to award Damages to the Plaintiff, to be paid by the Claimant; the Costs of the Arbitration, &c. to be paid by him, who shall be declared not to be entitled; so as the Award be made by a given Day; but the Time was several times enlarged by the Court, with the Consent of the Parties;—*That *the Claimant had no Right to the Furniture, but that the Plaintiff*

was entitled: and that the Claimant to pay the Plaintiff one Shilling Damages.

UNDER JUDGE'S ORDER, ON AGREEMENT, OF RIGHT TO FURNITURE, AND DAMAGES.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*arbitrator*], of Gray's Inn, in the county of Middlesex, barrister at law, *send greeting*. WHEREAS an action was lately commenced in his Majesty's Court of Common Pleas, by [*plaintiff*], against [*defendant*], (he the said [*defendant*], then, or lately before being sheriff of the county of): AND it was on the seventh of June now last past, by Sir Robert Dallas, knight, Lord Chief Justice of the said court, upon hearing the attornies or agents on both sides, and by their consent (*a*), *Ordered* (amongst other things), that all matters in differenee between the parties, should be referred to the award, order, arbitrament, final end, and determination of me the said [*arbitrator*], pursuant to the terms and conditions of a certain agreement, executed between the parties, and set forth in the said order, and which is as follows; "*Whereas* the said [*plaintiff*] claims to be entitled to the lease of a house, premises, and fixtures, situate at in the county of , lately occupied by one [*tenant*]; and also to the household goods and furniture therein and thereupon, under and by virtue of a certain bill of sale, and an assignment of such lease, bearing date respectively the twenty-third day of January last: *And whereas* one [*claimant*] claims to be entitled to the value of the said household furniture, under and by virtue of a writ of *fieri facias*, issued out of his Majesty's Court of King's Bench, at the suit of the said [*claimant*], upon a judgment obtained by him against the said [*tenant*]; on which the said household furniture has been seized by the sheriff of ; and the said sheriff, and the said [*plaintiff*], have had the joint possession thereof, from the time of levying such execution; and the said sheriff hath hitherto refused to quit and give up the same to the said [*plaintiff*], being indemnified for so doing by the said [*claimant*]: *Now it is hereby mutually agreed*, that the said execution shall be withdrawn, and the said [*plaintiff*] be left in the

Exordium.

Recital of an action against a sheriff:

and of a reference of all matters in difference between the parties, by a judge's order, pursuant to the terms of an agreement between the parties set forth in the order, and reciting that plaintiff claims a house, furniture, &c. under a bill of sale, and assignment of the lease:

that another claims the value of furniture under a *fi. fa.*

on which same has been seized by sheriff, who has had joint possession with plaintiff, being indemnified by claimant:

agreement that plaintiff shall have entire possession;

(*a*) *Vide ante*, 99, (*b*)

UNDER JUDGE'S ORDER, ON AGREEMENT, OF RIGHT TO FURNITURE, AND DAMAGES.

entire possession of the said house, household goods, and chattels: *And* that it be referred to [*arbitrator*], esquire, an arbitrator mutually appointed by the said parties, to investigate the nature of their respective claims: *And* if the said arbitrator should determine, that the said [*claimant*] is entitled to the said value of the household goods and furniture, under such execution as aforesaid, he the said [*plaintiff*] doth hereby undertake and agree to pay him the full value thereof at a fair appraisement: *And* if the said arbitrator should determine, that the said [*claimant*] had no right thereto; and that the said [*plaintiff*] is entitled to the same, the said arbitrator is to award and allow such damages to the said [*plaintiff*], to be paid by the said [*claimant*], as the said arbitrator shall deem reasonable: *And* the costs of the said arbitration, and of this agreement, and the reference and award, shall be paid by the party who shall be declared by the said arbitrator, not to be entitled to the said household goods and furniture, or the value thereof; *So as* the said arbitrator shall make and publish his award in writing, ready to be delivered to the said parties, or either of them requiring the same, on or before the twenty-eighth day of November instant: *And* that the said parties shall, in all things, stand to, abide by, fulfil, and keep such award so to be made and published as aforesaid;" *As* by the said order, reference being thereto had, will, among other things, more fully appear. AND WHEREAS by divers orders, made with the like consent, the time limited for me the said arbitrator to make my award in the premises, hath been from time to time duly enlarged. AND WHEREAS on the twenty-third day of December now last past, it was, by Sir John Richardson, knight, one of the justices of his Majesty's said Court of Common Pleas, upon hearing the attornies or agents on both sides, and by and with their consent, *Ordered*, that the time for me the said arbitrator to make my award in the said cause, should be enlarged until the first day of the then and now next Hilary term. NOW KNOW YE, that I the said [*arbitrator*], having taken upon myself the burthen of the said reference, and having heard, examined, and duly considered the allegations, vouchers, proofs, and witnesses of the said parties respec-

and the claims referred to arbitrator;

if he should determine that claimant is entitled to the value, plaintiff undertakes to pay same;

if he should determine that plaintiff is entitled, arbitrator to award damages to plaintiff, to be paid by claimant;

costs of arbitration, &c. to be paid by him who shall be declared not to be entitled;

so as the award be made by a given day;

parties to abide by award.

Recital of enlargements of time.

Recital of last enlargement of time.

Testatum.

tively, and investigated the nature of their respective claims, in the said agreement mentioned, *Do* make and publish this my award in writing of and concerning the matters to me referred, as follows; that is to say; I do award and determine, that the said [*claimant*] hath not, nor had any right or title to the said household goods and furniture, or the value thereof; but that the said [*plaintiff*] was and is entitled to the same. And I do further award and allow to the said [*plaintiff*], one shilling damages, to be paid to him by the said [*claimant*]. In witness, &c.

UNDER JUDGE'S ORDER, ON AGREEMENT, OF RIGHT TO FURNITURE, AND DAMAGES.

Award, that claimant had no right to furniture, but that plaintiff was entitled: and that claimant pay plaintiff 1*s.* damages.

AWARD, *under a* Judge's Order, *that a Cause in the King's Bench should be referred to Arbitration; that the Costs of the Cause, Reference, and Award, should be in the Arbitrator's Discretion; and that the Arbitrator might examine the Parties and Witnesses on Oath, to be sworn before a Judge of the Court, or a Commissioner:* That *the Defendant pay the Plaintiff, at, &c. a certain Sum: that it be received by the Plaintiff, in full satisfaction of all Matters referred: that each Party pay his own Costs of the Cause and Reference: and that the Costs of of the Award be paid equally.*

UNDER JUDGE'S ORDER, OF PAYMENT TO PLAINTIFF, &c.

To all to whom these presents shall come, I, [*arbitrator*], of the Inner Temple, special pleader, *send Greeting*. Whereas an action was lately commenced in his Majesty's Court of King's Bench, in which [*plaintiff*] was plaintiff, and [*defendant*], gentleman, one of the attornies of the said court, was defendant: And it was on or about the 4th day of December now last past, by the Honourable Sir William Draper Best, knight, one of the justices of the same court, upon hearing the attornies on both sides, and by their consent, *Ordered* (amongst other

Exordium.

Recital of an action in K. B.

and of a judge's order, that the cause should be referred to arbitration:

UNDER JUDGE'S ORDER, OF PAYMENT, TO PLAINTIFF, &C.

things, that the said cause should be referred to the award, order, arbitrament, final end, and determination of me the said [*arbitrator*] ; *so as* I should make and publish my award in writing, of and concerning the matters referred, ready to be delivered to the said parties in difference, or such of them as should require the same, on or before the twenty-third day of January instant: *And* that the said parties should in all things abide by, perform, fulfil, and keep such award, so to be made as aforesaid: *And* that the costs of the said cause, and the costs of the reference and award, should be in the discretion (*a*) of me the

that the parties should abide by the award:

that the costs of cause, reference, and award,

Power of arbitrator as to costs, when they are left to his *discretion*.

When a cause is referred he may award a gross sum, or costs to be taxed, or costs generally.

(*a*) When a cause is referred, and the costs are left to the *discretion* of the arbitrator, he may either award a *gross sum* to be paid for costs, *Shephard* v. *Brand*, Cas. temp. Hardw. 53; or he may award that one of the parties shall pay to the other *costs to be taxed by the master* or *prothonotaries; Winter* v. *Garlick*, 1 Salk. 75. 6 Mod. 195. S. C. *Pedley* v. *Goddard*, 7 Durnf. and East, 77; or he may award costs *generally*, in which case the master or prothonotaries shall tax them. *Dudley* v. *Nettlefold*, 2 Str. 737; *Perry* v. *Nicholson*, Say. Rep. 240; *Fox* v. *Smith*, 2 Wils. 267; *Stephenson* v. *Browning*, Barnes, 56; and see Hullock on Costs, 418, 419; *Candler* or *Chandler* v. *Fuller*, Willes, 62; Kyd on Awards 394, 2d ed. S. C. 2 Tidd's Prac. 863, 7th ed. And when an arbitrator, authorised to tax costs in a cause, has allowed an *item* which it is insisted ought not to have been charged, the court of King's Bench will not refer it to the master. *Anon.* 1 Chit. Rep. 38. But he cannot award that one of the parties shall pay to the other such costs as two persons named in the award, but not officers of the court, shall appoint; for this is an improper delegation of his authority. *Nott* or *Knott* v. *Long*, Cas. temp. Hardw. 181, Lee's edit. 2 Str. 1025. S. C. And where a special jury having been obtained on the motion of the defendant, the cause was referred; and by the order of reference, the costs of the cause were to abide the event, and the costs of the reference and of the special jury were left in the discretion of the arbitrator; it was held, that the arbitrator could not, after directing a verdict for the plaintiff, award that the latter should pay the costs of the special jury: the court thinking that the fair meaning of the submission was, that the arbitrator should have the power of allowing the costs of the special jury as costs in the cause, if the party who moved for the same were to succeed. *Finlayson* v. *M'Leod*, 1 Barnw. and Ald. 663.

But he cannot authorize any besides officers of the court to ascertain the costs.

said arbitrator: *And* that I the said arbitrator should be at liberty (if I should think fit), to examine the said parties to that suit, and their respective witnesses, upon oath, to be sworn before the said Sir William Draper Best, or some other judge of his Majesty's Court of King's Bench, or a commissioner duly authorised. Now know ye, that I the said [*arbitrator*], having taken upon myself the burthen of the said reference; and having heard, examined, and considered the allegations of the said parties and their respective witnesses, and the vouchers and proofs of the said parties respectively, *Do* make and publish this my

should be in arbitrator's discretion: and that the arbitrator might examine the parties and witnesses on oath, to be sworn before a judge of the court, or commissioner. Testatum.

If, under a submission by rule of court or order of *nisi prius*, an arbitrator award costs to be taxed by the master, such costs shall be taxed as between party and party, and not as between attorney and client. *Pratt* v. *Salt*, Cas. temp. Hardw. 161. Lee's edit. And it is settled, that an arbitrator cannot, in such a case, award any other than the common costs, as between party and party, unless he be expressly authorised so to do. *Marder* v. *Cox*, Cowp. 127; *Southmead* v. *Northmore*, Cas. Prac. C. P. 69; *Durrant* v. *Kerr*, ibid, 70; *Barker* v. *Timson*, 2 Wm. Bla. 953. So upon a submission by bond of all matters in difference between the parties in a *cause*, without making any mention of *costs*, the arbitrator has no authority to award costs as between attorney and client. *Whitehead* v. *Firth*, 12 East, 165. But when there is no cause depending, and the reference is entirely the act of the parties, as there can be no taxation by an officer of the court, costs as between attorney and client may be awarded. *Hartnell* v. *Hill*, Forrest. 79; *ante*, 10 (*c*).

Taxed costs must be as between party and party: when a cause is referred, the arbitrator can award no other costs, without authority;

But when there is no cause depending, he may award costs as between attorney and client.

And if arbitrators award the defendant to pay the plaintiff his costs, to be taxed by the proper officer before a particular day, it is the business of the *defendant* to have them taxed before that day, *Candler* v. *Fuller*, Willes, 62; *Bigland* v. *Skelton*, 12 East, 438; and if he do not, the *plaintiff*, it seems, may proceed to have them taxed *ex parte*. *Sadler* v. *Robins*, 1 Campb. 255.

If defendant be ordered to pay costs, he should get them taxed by the day of payment.

Under a submission to arbitration of two assaults, for one of which the defendant had been indicted and convicted at the quarter sessions, and of all costs incident to the indictment and subsequent proceedings thereon, the arbitrator having awarded a payment in satisfaction of all costs incident to the indictment, and previous as well as subsequent proceedings thereon, &c., the Court of Common Pleas held, that he

On referring a cause, the arbitrator may award costs *subsequent* to the order.

UNDER JUDGE'S ORDER, OF PAYMENT TO PLAINTIFF, &c.

Award that defendant pay plaintiff, at, &c. a certain sum: that it be received by plaintiff in full satisfaction of matters referred: that each party pay his own

award in writing, of and concerning the matters referred to me as aforesaid, as follows; that is to say; I do award, order, and adjudge, that the said [*defendant*] shall and do pay, or cause to be paid to the said [*plaintiff*], at the White Hart Tavern, opposite Chancery Lane, in Holborn, on the twenty-seventh day of January instant, between the hours of twelve at noon and one in the afternoon, the sum of 7*l.* 3*s.* 6*d.*: And that the same shall be received by the said [*plaintiff*] in full satisfaction and discharge of and for all the matters in difference to me referred as aforesaid. And I do further award, order, and adjudge, that

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had not thereby exceeded his authority. *Baker* v. *Townshend*, 7 Taunt. 424; 1 Moore, 120. S. C. And on a submission to arbitration under an order of *nisi prius*, the arbitrator may award costs *subsequent* to the order; but where the submission is by bond, he cannot award subsequent costs, unless power be expressly given him for that purpose. *Carpenter* v. *Joynes*, Pr. Reg. 45; *Tynte* v. *Every*, Barnes, 58; *Hartnell* v. *Hill*, Forrest, 73; *ante*, 10, (*c*).; and see *Wood* v. *O'Kelly*, 9 East, 436; *ante*, 109.

The general term *costs* does not include the costs of *reference*.

If an arbitrator appointed under an order of *nisi prius*, only award costs to be taxed generally, the costs of the reference ought not to be allowed on the taxation, but merely the costs of the suit. *Bracher* v. *Cotton*, Barnes, 123; *Browne* v. *Marsden*, 1 Hen. Bla. 223. Nor will the general term *costs*, in the rule of reference, include the costs in that reference. *Bradley* v. *Tunstow*, 1 Bos. and Pul. 34; 7 Taunt. 213. S. C. Neither will an award that one party shall pay to the other the costs by him sustained in the action, include the costs of the reference. *Browne* v. *Marsden*, 1 Hen. Bla. 223.

It is doubtful whether a direction to pay "the costs of the award" is void for uncertainty.

Where the arbitrator directs the payment of the costs of the *award* generally, without fixing the amount of them, it is doubtful whether the award is bad in that respect for uncertainty, or whether the amount may not be taxed by the officer of the court. *Vide ante*, 10, (*c*).

When a cause goes off on an ineffectual arbitration, and is afterwards tried, costs are allowed as on a *remanet*.

When a cause goes off upon an ineffectual arbitration, and is afterwards tried, costs are allowed as upon a *remanet*. *Burchall* v. *Ballamy*, 5 Burr. 2694; Sayer on Costs, 179, 2d ed. S. C. *Sparrow* v. *Turton*, 2 Tidd's Prac. 864, 7th ed. Sayer on Costs, 178, 2d ed. S. C: and see *Booth* v. *Atherton*, 6 Durnf. and East, 144: but the practice was formerly otherwise; see *Bracher* v. *Cotton*, Cas. Pr. C. P. 138; Pr. Reg. 103. S. C. The point does not appear to be affected by the subsequent cases of *Mason* v. *Skurray*, Doug. 438; *Hankey* v. *Smith*, 3 Durnf. and East, 507: *Smith* v. *Haile*, 6 Durnf. and East, 71; *Lickbarrow* v. *Ma-*

each of the said parties shall and do bear and pay his own costs of the said cause and of this reference; *And* that the costs of this my award, be paid in equal moieties between them. In witness whereof, I the said arbitrator have hereto set my hand this twenty-third day of January, in the year of our Lord 18 .

UNDER JUDGE'S ORDER, OF PAYMENT TO PLAINTIFF, &c.

costs of cause and reference; and that the costs of award be paid equally. Testimonium.

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son, ibid. 131; *Rouse* v. *Bardin*, 1 Hen. Bla. 639, there not being in any of them a reference to arbitration.

In general the arbitrator does not name the fee to be paid to himself; it is more usual for the master to allow it, according to the circumstances of the case. Caldw. on Arb. 77. *Vide ante*, 11.

When a cause is referred, the arbitrator does not name his own fee.

See further as to Costs, *ante*, 10, (*c*); 106, (*b*).

AWARD *under a* JUDGE'S ORDER, *whereby a Cause was referred to one Arbitrator; the Costs of the Action to abide the Event of the Award; the Costs of Reference to be in Arbitrator's Discretion; the Parties and Witnesses to be examined on Oath, to be sworn before a Judge of the Court, or a Commissioner; the Parties to produce all Books, &c. and the Order to be made a Rule of Court;*—THAT *the Proceedings in the Cause shall cease: that the Defendant shall pay the Plaintiff, or his Attorney, a certain Sum, in full of all Demands in the Cause: that on Payment thereof, the Plaintiff shall, if required, at the Defendant's Costs, execute a General Release: and that the Plaintiff and Defendant shall each pay his own Costs of the Reference and of the Award.*

UNDER JUDGE'S ORDER, OF PAYMENT, GENERAL RELEASE, &c.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I [*arbitrator*] of, &c. *send greeting*. WHEREAS by an

Recital of a judge's order,

UNDER JUDGE'S ORDER, OF PAYMENT, GENERAL RELEASE, &c.

whereby a cause was referred to one arbitrator,

so as, &c.

costs of action to abide event of award;

costs of reference to be in arbitrator's discretion:

parties and witnesses to be examined on oath, to be sworn before a judge of court, or commissioner:

parties to produce all books, &c.

order to be made a rule of court.

Testatum.

Award,

that proceedings in cause shall cease:

that defendant shall pay plaintiff, or his attorney, a certain sum, in full of all de-

order, the right Honourable Sir Charles Abbott, knight, Lord Chief Justice of his Majesty's Court of King's Bench, at Westminster, dated the day of last, and made in a certain cause then and now depending in the same court, wherein [*plaintiff*] is plaintiff, and [*defendant*] is defendant, the said Chief Justice, upon hearing the attornies or agents on both sides, and by their consent, did *Order*, (amongst other things,) that all matters in difference between the parties in the said cause should be referred to the award, order, arbitrament, final end, and determination of me the said [*arbitrator*]; *so as* I should make and publish my award in writing of and concerning the premises, on or before the day of then and now next: AND by the like consent, the said Chief Justice did *further order*, that the costs of the said action should abide the event of my award: *And* that the costs of such reference should be in the discretion of me the said arbitrator: AND by the like consent, the said Chief Justice did *further order*, that the parties, and their respective witnesses, might be examined upon oath, to be sworn before any judge of the Court of King's Bench, or a commissioner for taking affidavits in the said court; *And* that the parties should produce before me, the said arbitrator, all books, papers, and writings in their custody or power, touching the matters in question; *And* that the said order should be made a rule of the said Court of King's Bench, if the same court should so please; *As* by the said order more fully appears. NOW KNOW YE, that I the said [*arbitrator*], the arbitrator aforesaid, having taken upon me the burthen of the said arbitrament, and having heard, examined, and considered the allegations and proofs of both the said parties concerning the premises, *Do* thereupon make this my award in writing concerning the same, in manner following; that is to say; I do award, adjudge, and determine, that all further proceedings in the said cause shall henceforth cease, and be no further prosecuted: AND that the said [*defendant*] shall and do, on the day of instant, (*or* next), between the hours of and of the clock of the same day, well and truly pay, or cause to be paid unto the said [*plaintiff*],

UNDER JUDGE'S ORDER, OF PAYMENT, GENERAL RELEASE, &c.

or his attorney, Mr. , of , for the use (*a*), of the said [*plaintiff*], at , the sum of pounds of lawful money of Great Britain [and Ireland], in full of all demands in the said cause: AND that upon payment thereof, the said [*plainiff*] shall, if required so to do, by and at the costs of the said [*defendant*], execute and deliver to him the said [*defendant*], a general release in writing of all and all manner of action and actions, cause and causes of actions, debts, duties, claims, and demands whatsoever, from the beginning of the world until the day of the date of the aforesaid order. AND LASTLY, I do award and direct, that each of them the said [*plaintiff*] and [*defendant*] shall and do bear and pay his own costs of the reference, and of this my award. IN WITNESS whereof, I the said [*arbitrator*], the arbitrator aforesaid, have hereunto set my hand the day of , 18 .

mands in cause:

that on payment thereof, plaintiff shall, if required, at defendant's costs, execute a general release;

and that plaintiff and defendant shall each pay his own costs of reference and of award.

Testimonium.

(*a*) On shewing cause against a rule which had been obtained, to set aside an award, on the ground that the money was awarded to be paid to a stranger, the court were clearly of opinion, that an award directing payment to one person for the use of another was good; and though the party to receive the money did not appear to be invested with any express authority by the person for whom the money was to be paid, the award was nevertheless sufficient: and they said, that supposing the person to receive the money was a banker, it would do; and here it was to be paid for the *use* of one of the parties to the submission. It appeared from the affidavit, that the person was agent; and though it was urged that he was not invested with any agency for this purpose, yet the Court said, that circumstance made no difference. *Snook* v. *Hellyer*, 2 Chit. Rep. 43. But an award to pay money to a stranger is bad, although he be the attorney of the party, unless the award states it to be for the benefit of the party. *Buckhurst* v. *Mayo*, 1 Roll. Abr. 247, (E.), pl. 5. *Futrell* v. *White*, Dyer, 242, a, (51), in marg. *Ecclestade* v. *Maliard*, Cro. Eliz. 4. *Dudley* v. *Mallery*, cited 3 Leon. 62. *Bedam* v. *Clerkson*, 1 Ld. Raym. 123. *Bird* v. *Bird*, 1 Salk. 74. Com. Dig. *Arbitrament*, (E. 7.)

An award that money shall be paid to a stranger, for the use of one of the parties to the submission, is good:

but if the award do not state it to be for his use, it is bad.

UNDER ORDER BY LORD CHANCELLOR, OF BALANCE OF ACCOUNT.

AWARD *by an Umpire, under an Order by the* LORD CHANCELLOR, *whereby a Chancery Cause was referred to the Solicitors for the Parties, who, in case of Difference, were to choose an Umpire;* THAT *the Balance due to the Defendant was* 348*l.*: *and* 200*l. having been paid him by the Plaintiff, since the Order of Reference, that the Balance now is* 148*l.*

Exordium.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I [*umpire*], of Lincoln's Inn, barrister at law, *send greeting.*

Recital of an order by the Lord Chancellor, whereby a Chancery cause was referred to the solicitors for the parties, who, in case of difference, were to choose an umpire.

WHEREAS by a certain order, made by the Lord High Chancellor of Great Britain, on the day of , in the year of the reign of his present Majesty King George the Fourth, in a certain cause then depending in the High Court of Chancery, wherein [*plaintiff*] was the plaintiff, and [*defendant*] was the defendant, it was, by the consent of the said parties, and their counsel, *Ordered*, among other things, that all accounts should be settled between the said plaintiff and defendant, and the balance paid to the defendant immediately on such settlement, including the balance on a certain note of hand, and also the wages of the said defendant: and that the accounts between the said parties should be referred to Mr. [*arbitrator*], solicitor for the said plaintiff, and Mr. [*arbitrator*], solicitor for the said defendant, who, in case of differing, were to choose a third person.

Recital that arbitrators differed, and appointment of umpire.

AND WHEREAS the said Mr. [*arbitrator*] and Mr. [*arbitrator*] did differ as to the said settlement of the said accounts; *And* did in consequence thereof choose and appoint me the said [*umpire*], to settle the same.

AND I the said [*umpire*], having taken upon myself the settlement of the said accounts, and having heard and duly considered the allegations, vouchers, and proofs of the said parties, have settled the said accounts:

Award that balance due to

AND do hereby award, adjudge, and declare the

balance due from the said plaintiff to the said defendant, upon such settlement, including the balance on the said note of hand, and the said defendant's wages, to be the sum of three hundred and forty-eight pounds. And it having been admitted before me, by the said solicitors of the said parties, that the sum of two hundred pounds has been paid by the said plaintiff to the said defendant, between the date of the said order and of this my award, as part of and towards the sum of money that might be found due on such settlement; I do further declare, that the sum now remaining due, to be paid by the said plaintiff to the said defendant, as the balance of the said accounts, is one hundred and forty-eight pounds. In witness, &c.

UNDER ORDER BY LORD CHANCELLOR, OF BALANCE OF ACCOUNT.

defendant was 348*l.*;

and 200*l.* having been paid him by plaintiff since the order of reference,

that the balance now due is 148*l.*

AWARD, *under an Order of Reference, that the Plaintiff has no Claim on the* Assignees of a Bankrupt (*a*), *in respect of a certain Ship; or for any Monies lent the Bankrupt, or expended on the Ship: that the Plaintiff never had any Title to the Ship: that the Plaintiff shall on Demand deliver to the Assignees all Papers relating to the Ship: and that the Assigness permit the Plaintiff to prove a certain Sum under the Commission, as a Debt due from the Bankrupt.*

NO CLAIM ON BANKRUPT'S ASSIGNEES AS TO A SHIP, BUT PLAINTIFF TO PROVE A DEBT.

Now know ye, &c., I do award, adjudge, and declare, that the said [*plaintiff*] hath no claim or demand

Award that plaintiff has no claim on as-

(*a*) By the 5 Geo. II. c. 30, s. 34, reciting, "Whereas assignees are and may sometimes be prevented from making such speedy dividends of the estate and effects of bankrupts, as by this act is intended, by reason of debts due, or pretended and claimed to be due from such bankrupts, upon long and intricate accounts or demands, which are disputed or not admitted by the commissioners and creditors to be

Assignees, with consent of the major part in value of the creditors present, may submit disputes to arbitration.

signees in respect of a certain ship; or for any monies lent bankrupt, or expended on the ship; that plaintiff never had any title to the ship; that plaintiff shall, on demand, deliver to assignees all papers relating to the ship:

whatsoever upon the said [*assignees*], as assignees as aforesaid, or either of them, for or in respect of a certain ship or vessel called the ; or for or in respect of any monies lent or advanced to the said [*bankrupt*], the said bankrupt, or paid, laid out, or expended upon the credit of the said ship or vessel: *And* that the said [*plaintiff*] hath not, nor at any time whensoever had any interest, right, title, claim, or demand whatsoever, in, to, or in respect of the said ship or vessel. And I do award, order, and direct, that the said [*plaintiff*] shall upon demand, deliver up to the said [*assignees*], assignees as aforesaid, all papers and documents in any wise relating to, or other-

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just and fair debts; and such claimants are thereby obliged to ascertain such their demands by actions or suits in law or equity, which are oftentimes many years depending; and many other differences and difficulties do arise under commissions of bankrupts, which might be determined by arbitration, if assignees had power to submit the same:" it was enacted, "That it shall and may be lawful to and for the assignee or assignees of any bankrupt's estate and effects, by and with the consent of the major part, in value, of the bankrupt's creditors, who shall have duly proved their debts under such commission, and who shall be present at any meeting of the said creditors, pursuant to notice, to be for that purpose given in the *London Gazette*, to submit any difference or dispute between such assignee or assignees and any person or persons whatsoever, for or on account, or by reason or means of any matter, cause, or things whatsoever, relating to such bankrupt, or bankrupts, his, her, or their estate or effects, to the final end and determination of arbitrators, to be chosen by the said assignee or assignees, and the major part in value of such creditors, and the party or parties with whom they shall have such difference; and to perform the award of such arbitrators, or otherwise to compound and agree the matters in difference and dispute between them, in such manner as the said assignee or assignees, with such consent as aforesaid, shall think fit, and can agree; and the same shall be binding to all the creditors of the said bankrupt or bankrupts; and the assignees are hereby indemnified for what they shall fairly do according to the direction aforesaid."*

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* [By the new Bankrupt Act, 6 Geo. IV. c. 16, sec. 88, this clause is re-enacted in the same words, the following clause being added: "Provided, that if one third in value, or upwards, of such creditors,

wise concerning the title of the said ship or vessel, now in the possession, custody, or power of the said [*plaintiff*], or of any person for or on account of him the said [*plaintiff*]. And I do further award, order, and direct, that the said [*assignees*], as assignees as aforesaid, shall and do suffer and permit the said [*plaintiff*], to prove the sum of hundred pounds, and no more, under the commission of bankrupt against the said [*bankrupt*], as a debt due and owing from him the said [*bankrupt*] before his bankruptcy, to the said [*plaintiff*], and as the balance of mutual credit between them the said [*plaintiff*] and the said [*bankrupt*].

NO CLAIM ON BANKRUPT'S ASSIGNEES AS TO A SHIP, BUT PLAINTIFF TO PROVE A DEBT.

and that assignees permit plaintiff to prove a certain sum under the commission, as a debt due from bankrupt.

The creditors present at a meeting cannot give the assignees a general power for this purpose; but the assignees must have a meeting of creditors, upon notice given for that purpose in the *London Gazette*, to consider of each particular case for arbitration, before they can proceed to a reference. Ex parte *Whitchurch*, 1 Atk. 91.

The creditors cannot give assignees a general power to refer; but the statute must be complied with in each case.

[It may be here observed, that bankruptcy is not a revocation of a submission to arbitration, *Andrews* v. *Palmer*, 4 B. & A. 251. *Ed.*]

It has been held, that trustees of an insolvent debtor, by entering into an arbitration bond, confessed that they had sufficient funds; and by referring all matters in difference, and agreeing to pay what should be awarded, they had made themselves responsible for the payment of costs. In re *Wansborough* and *Wansborough* v. *Dyer*, 2 Chit. Rep. 40. [So where assignees of a bankrupt refer generally all matters in dispute to arbitration, without protesting against the reference being an admission of assets, it will amount to such admission, *Robson* v. ———, 2 Rose, B. C. 50.

Trustees of insolvent debtor entering into arbitration bond, admit that they have assets, and may be directed to pay costs.

By the 7th Geo. IV. c. 57, sec. 24, it is enacted, "That it shall and may be lawful for the assignee or assignees of any such prisoner, and such assignee or assignees is and are hereby empowered to sue from time to time, as there may be occasion, in his or their own name or names, for the recovering, obtaining, and enforcing of any estate, effects, or rights of such prisoner, but in trust for the benefit of such assignee or assignees and the rest of the creditors of such prisoner, according to

7 Geo. IV. c. 57. s. 24. Assignees of insolvent debtors empowered to sue for and compound debts.

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shall not attend at any such meeting, (whereof such notice shall have been given as aforesaid) the assignees shall have power, with the consent of the commissioners, testified in writing under their hands, to do any of the matters aforesaid." *Ed.*]

NO CLAIM ON BANKRUPT'S ASSIGNEES AS TO A SHIP, BUT PLAINTIFF TO PROVE A DEBT.

And to submit disputes to arbitration, provided that the major part of the creditors assent.

the provisions of this act; and to give such discharge and discharges to any person or persons who shall be respectively indebted to such prisoner as may be requisite; and to make compositions with any debtors or accountants to such prisoner where the same shall appear necessary, and to take such reasonable part of any such debts as can upon such composition be gotten in full discharge of such debts and accounts, and to submit to arbitration any difference or dispute between such assignee or assignees and any person or persons for or on account or by reason of any matter, cause, or thing relating to the estate and effects of such prisoner: provided, nevertheless, that no such composition, on submission to arbitration, shall be made, nor any suit in equity be commenced, by any such assignee or assignees, without the consent in writing of the major part in value of the creditors of such prisoner, who shall meet together pursuant to a notice of such meeting, to be published at least fourteen days before such meeting, in the *London Gazette*, and also in some newspaper most usually circulated in the neighbourhood of the place where such prisoner had his or her last usual residence before his or her imprisonment as aforesaid, nor without the approbation of the said court, or of one of the commissioners thereof." *Ed.*]

As to a reference by an executor or administrator, on the same principle, *vide ante*, 89—90.

CONFIRMING FORMER AWARD, SENT BACK FOR RECONSIDERATION.

AWARD *on a former Award being sent back to the Arbitrator for his Reconsideration* (*a*) *; reciting an Order of* Nisi Prius, *whereby the Jury was ordered to find a Verdict for the Plaintiff, with Costs, subject to a Reference of all Matters in Difference in the Cause: that the Costs of the Cause should abide the Event of the Award: that the Costs of the Reference should be in the Arbitrator's Discretion: the Order afterwards made a Rule of the Court of King's Bench: several Enlargements of the Time for making the Award: that the Arbitrator ordered the Defendant to pay the Plaintiff a certain Sum: a Rule calling on the Defendant to shew Cause why an Attachment should not issue against him, for Nonperformance of the Award: a Rule whereby the Rule to shew Cause was enlarged, the Defendant consenting to go before the same Arbitra-*

(*a*) A rule having been obtained to shew cause why an award should not be set aside, on the grounds which appeared in the affidavit to support the motion; but on moving to make the rule absolute, the court refused to grant the motion. Application was then made to the court to let the matter go back again to the arbitrator, on an affidavit, that the party had procured new evidence since the reference. Mr. Justice Bayley said, you should have applied to the arbitrator to delay making his award, and appoint another meeting to hear the additional evidence. It was answered by the counsel for the rule, that the evidence was not discovered till after the award was made. Mr. Justice Abbott said, that is not sufficient; you must shew by affidavit what it was, as in the case of a new trial on the same ground, that there was some surprise, and that it was not such evidence as a reasonable man might anticipate. But Mr. Justice Bayley said, that is not sufficient. The affidavit

On an application to the court to let the matter go back to the arbitrator, on the ground that the party had procured new evidence since the award, the affidavit should shew that it was such evidence as a reasonable diligence could not have obtained.

CONFIRMING FORMER AWARD, SENT BACK FOR RE-CONSIDERATION.

tor, who was to reconsider the Amount of Damages; so as the Sum then awarded should be invested in Exchequer Bills, and deposited at the Bank in the Attornies' Names, and paid to the Plaintiff's Attornies either wholly or partly, according to the second Award: Enlargement of the last Rule, and of the Time for making the Award: the Costs of the further Reference and Award, to be in the Arbitrator's Discretion; CONFIRMATION OF FORMER AWARD: *the Exchequer Bills to be delivered to the Plaintiff's Attornies; and the Defendant to pay the Plaintiff's Attornies the Costs of the Second Reference and Award; such Costs to be first taxed.*

Exordium.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*arbitrator*], of the Inner Temple, barrister at law, *send greeting*. WHEREAS by a certain order, made at the sitting of *nisi prius*, held at Guildhall, in and for the city of London, on Monday the 29th day of April, in the year of our Lord 18 , before the Right Honourable Sir Charles Abbott, knight, Lord Chief Justice of our Lord the King, assigned to hold pleas before the King himself, in a certain

Recital of an order of *nisi prius*, whereby the jury was ordered to find a verdict for the plaintiff, damages 8000*l.*, costs 40*s.*

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should go further, and shew that it was such evidence as a reasonable diligence could not have obtained. The rule was discharged. *Eardly* v. *Otley*, 2 Chit. Rep. 42. [And see *Utting* v. *Evans*, 1 M'Clell. 12. An award cannot be referred back to an arbitrator to correct a mistake, without the consent of the parties. *Ex parte Cuerton*, 8 Dow. & Ry. 774. *Ed.*]

Fraud in obtaining submission, no ground for setting aside an award; but may be given in evidence in an action on award.

A rule was refused to a motion to set aside an *award*, on the ground that the *submission* had been obtained by fraud; the application should have been to set aside the order, making the submission a rule of court. Where the submission has been obtained by fraud, and an action is brought on the award, the fraud may be given in evidence under a plea of *non assumpsit*, or *nil debet*. *Sackett* v. *Owen*, 2 Chit. Rep. 39. [See *Auriol* v. *Smith*, Turn. 126; *Dawson* v. *Sadler*, 1 Sim. & Stu. 537.]

Rule granted to set aside an award, on application of party in whose favour it was

Where counsel moved to set aside an award in favor of his own client, on an affidavit of acknowledgement by the arbitrator and defendant that a considerable sum had been by mistake omitted to be awarded to his client, the Court of King's Bench granted a rule *nisi*. *Anon.* 2

CONFIRMING FORMER AWARD, SENT BACK FOR RECONSIDERATION.

cause then depending in the same court, wherein [*plaintiff*] was plaintiff, and [*defendant*] was defendant; *It was ordered* by the court, by and with the consent of the plaintiff and defendant, their counsel and attornies, that the jury should find a verdict for the plaintiff, damages 8,000*l.* and costs 40*s.*; *Subject* to that order, and the award to be made pursuant thereto: *And* that all matters in difference in the said cause between the parties, should be referred to the award, order, arbitrament, final end, and determination of me the said [*arbitrator*]; *so as* I should make and publish my award in writing, of and concerning the premises in question, on or before the last day but one of Easter Term then next ensuing: *And* that the said parties should and would perform, fulfil, and keep such award, so to be made by me the said arbitrator as aforesaid: *And* that the costs of the cause should abide the event and determination of my said award: *And* that the costs of the reference should be in the discretion of me the said arbitrator, who should direct and award by whom, and to whom, and in what manner the same should be paid: *Which* said order was afterwards entered and made a rule of his Majesty's Court of King's Bench. AND WHEREAS, by reason of my being unable to make my award within the time limited by the said order, the time for making my award was, by certain rules of the said Court of King's

subject to a reference of all matters in difference in the cause;

so as, &c.

that parties should perform award;

that costs of cause should abide event of award:

that costs of reference should be in arbitrator's discretion;

order afterwards made a rule of K. B.

Recital of enlargement from time to time.

Chit. Rep. 44. And see *Henfrey* v. *Bromley*, 6 East, 309; Vol. II. 652. [*Ante*, 117, and *Cayne* v. *Watts*, 3 Dow. & Ry. 224.] In *Rogers* v. *Dallimore*, 6 Taunt. 115, S. C. 1 Marsh. Rep. 474, the Court of Common Pleas, in a case similarly circumstanced, held, that a rule absolute might be pronounced either to set aside the award, or to send back the case to the same arbitrator, or to amend the award by altering it to the enlarged sum. In that case the latter course was adopted, in order to save further expense.

But in ordinary cases, an application for either of these purposes must, it seems, even where the submission is by rule of court in an action pending, be made within the time limited by the statute. *Rogers* v. *Dallimore*, 1 Marsh. Rep. 473. 6 Taunt. 114, S. C. *Vide ante*, Vol. II. 578. In *Zachary* v. *Shepherd*, 2 Durnf. & East, 781, where a cause had been referred, the court held, that a motion that an award should be referred back to the same arbitrator to reconsider it,

made, it appearing that a sum had been omitted by mistake:

or the award may be sent back to the same arbitrator:

or the rule made absolute to amend the award, by altering it to the enlarged sum.

In ordinary cases, the court will look to the limita-

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Bench, from time to time duly enlarged. And whereas, by a certain other rule of the said Court of King's Bench, made on Wednesday next after the Octave of the Purification of the Blessed Virgin Mary now last past, upon hearing counsel for the plaintiff and defendant; and by their consent; *It was ordered*, that the time limited for me the said arbitrator making my award between the said parties, should be further enlarged until the first day inclusive (*a*) of the then next term. And whereas, in compliance with the said order and rules, and in pursuance thereof, I the said arbitrator did, on the fifteenth day of April now last past, make and publish my award in writing of and concerning the matters to me referred, whereby (among other things), I ordered and directed a certain sum of money, therein mentioned, to be paid by the said defendant to the said plaintiff, at a certain time and place therein mentioned. And whereas, after the making and publishing of my said award, and after the time thereby limited for the payment of the money thereby awarded to be paid by the said defendant to the said plaintiff, it was, by a certain other rule of the said Court of King's Bench, made on the Friday next after the morrow of the Holy Trinity now last past, *Ordered*, that the defendant, upon

Recital of last enlargement.

Recital of award, whereby arbitrator ordered defendant to pay plaintiff a certain sum.

Recital of a rule, calling on defendant to shew cause why an attachment should not issue against him for non-performance of the award.

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tion of time given by the statute, as a rule to guide their discretion as to the time of reviewing awards made under rules of court.

on the ground that he had not sufficient materials before him at that time, must be made before the last day of the next term after such award made, according to 9 and 10 Wm. III. c. 15, s. 2. although the arbitrator be not charged with corruption or undue means. But the court is not limited by time from setting aside an award founded on a submission by rule of court in an action pending, where there has been a plain mistake of the arbitrator, and the counsel for the plaintiff was instructed to move sooner, but from some circumstance he did not, although the application be not made in the term next after making of the award. *Rogers* v. *Dallimore, ut supra.* For the statute extends only to cases where the submission is by bond, or a written agreement of the parties. *Anderson* v. *Coxeter*, 1 Str. 301. *Dubois* v. *Medlycott*, Barnes, 55. *Synge* v. *Jervoise*, 8 East, 465. *Ansell* v. *Evans*, 7 Durnf. & East, 1. *ante*, Vol. II. 578. The distinction being between cases where the reference is entered into by the original agreement of the par-

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(*a*) *Vide ante*, 43, (*b*).

CONFIRMING FORMER AWARD, SENT BACK FOR RECONSIDERATION.

notice of that rule to be given to him, should, upon Wednesday next after the Octave of the Holy Trinity, shew cause why a writ of attachment should not issue against him for his contempt, in not paying the sums of 3,535*l.*, and 546*l.* 0*s.* 10*d.*, pursuant to a certain rule and allocatur therein mentioned, and to my said award. AND WHEREAS by a certain other rule of the said court of King's Bench, made on Thursday next after the Octave of the Holy Trinity now last past, *It was ordered*, that the said rule be enlarged until the last day but two of the then Trinity Term, the defendant thereby consenting to go before the same arbitrator, who was to reconsider the amount of the damages; so as the sum then awarded should be invested in Exchequer bills, and deposited in the Bank of England within a week then next ensuing, in the names of the attornies in the cause for both parties: *And* that the same should be paid out (either in the whole or such part as should be awarded), upon such award being made, to the attornies for the plaintiff. AND WHEREAS by a certain other rule of the said Court of King's Bench, made on Monday next after three weeks of the Holy Trinity now last past, *It was ordered*, that the rule made in the said cause on Friday next after the morrow of the Holy Trinity, in the then Trinity Term, should be further enlarged until the first day of the then next Michaelmas Term:

Recital of rule, whereby the rule to shew cause was enlarged, defendant consenting to go before the same arbitrator, who was to reconsider amount of damages; so as the sum then awarded be invested in exchequer bills, and deposited at the Bank in attornies' names; and paid to plaintiff's attornies, either wholly or partly, according to second award. Recital of enlargement of last rule;

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ties,—the court not being in possession of any cause between them,—in which case the court could not interfere, except under the statute; and those cases where the aid of the statute is not necessary to give the court authority. *Rogers* v. *Dallimore*, 1 Marsh. Rep. 472; for instance, the statute does not apply to awards made under the authority of a rule of court made in an action pending. For those awards under orders of *nisi prius*, or of a judge at chambers, derive their authority only from the retrospective operation of the rule of court which is afterwards made, and therefore they are awards under rules of court. 6 Taunt. 114. S. C. Strictly speaking, therefore, it is an inaccurate expression to say that an award is made under a judge's order; for in fact it is to the subsequent rule of court that it owes all its authority. And no order of a judge, whether made at *nisi prius* or at chambers, is a ground for an attachment, unless made a rule of court.

Orders of reference at *nisi prius*, or of a judge at chambers, derive their authority from the subsequent rule of court; and they are no ground for attachment, unless made a rule of court.

If a motion for setting aside an award be made on slight grounds,

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and of time to make award: costs of further reference and award to be in arbitrator's discretion.

Testatum.

Confirmation of former award.

The exchequer bills to be delivered to plaintiff's attornies: and defendant to pay plaintiff's attornies, costs of second reference, and award; such costs to be first taxed.

And that I the said arbitrator should have until three weeks after the end of the then Trinity Term to make my award: *And* that the costs of the further reference and award should be in my discretion. Now know ye, that I the said arbitrator, having reconsidered the amount of the damages, in pursuance of the said rule for that purpose made, and having heard and duly considered the allegations, proofs, and witnesses of the said parties relating thereto, do hereby declare, that I see no reason to alter the amount of the damages: *And* I do therefore hereby confirm my said former award. And I do order and direct the several Exchequer bills, and other securities wherein the money was invested, in pursuance of the said rule in that behalf, to be forthwith delivered over to the attornies for the said plaintiff. And I do further award, order, and direct, that the said defendant shall and do pay to Messrs. [*attornies*], the attornies for the said plaintiff, on behalf and for the use (*b*) of the said plaintiff, within one week next after notice in writing for that purpose given to the said defendant, or left at his usual place of abode, or at the office of his attorney, Mr. [*attorney*], the costs and expenses of this second reference, and of stamping and writing this my further award; such costs and expenses to be first taxed (*c*) by the proper officer of the said Court of King's Bench. In witness, &c.

Rule discharged with costs on a frivolous application.

the rule will be discharged with costs. *Snook* v. *Hellyer*, 2 Chit. Rep. 43. [And see further, *ante*, 117].

In K. B. the objections intended to be insisted on must be stated in the rule.

Where a rule to shew cause is obtained in the Court of King's Bench, *to set aside* an award, the several objections thereto, intended to be insisted upon at the time of making such rule absolute, must be stated in the rule to shew cause. *Regula Generalis*, 4 Barnw. & Ald. 539. [*Smith* v. *Briscoe*, 11 Pri. 57. *Rawsthorn* v. *Arnold*, 6 B. & C. 629].

[A party, after accepting the costs of the reference and award, is precluded from moving to set it aside. *Kennard* v. *Harris*, 2 B. & C. 801. 4 D. & R. 272. *Ed.*]

(*b*) *Vide ante*, 138, (*a*).

(*c*) *Vide ante*, 133, (*a*).

COVENANT TO PERFORM AWARD AS TO COURSE OF HUSBANDRY, PAYMENTS, &c.

DEED OF COVENANTS *by a Lessee, in pursuance of an Award* (*a*) *to farm during the Remainder of a Term according to the* COURSE OF HUSBANDRY *mentioned in a Schedule: and every Year during the Remainder of the Term, to feed off at least Sixty Acres of Meadow or Pasture Ground; and at the End of the Term, to leave the Lands directed in the Schedule to be left in Turnips, in an Husbandry-like Manner, sown with Turnips, twice properly hoed; the Lessee being paid for the same at the Valuation of two Referees, or their Umpire: and at the End of the Term, to leave all the Hay which shall arise in the last Year of the Term, properly stacked; the Lessee being paid for the same at the Valuation of two Referees, or their Umpire: during the Remainder of the Term, to keep all the Covenants of the Lease (except such as are altered by these Presents); and in every respect to perform the Award; and to perform all such Acts, and make all such Payments, as are thereby directed to be done and made by him.*

THIS INDENTURE, made the day of ,

(*a*) The above deed is made pursuant to the direction, page 29, of the award, *ante*, 25.

Reference to forms on which the above deed is founded.

See the submission on which the award is founded, *ante*, Vol II. 615.

A chancery receiver cannot submit breaches of lease without the court's order; nor a receiver by deed, unless he has an express power.

But in relation to the forms alluded to, it must always be remembered that they are adapted to a common reference by landlord and tenant, or by a receiver duly authorised to make such a submission. For a chancery receiver has no authority to do it, without the direction of the court. *Vide ante*, Vol. II. 426, (*l*). Nor has a receiver appointed by a deed, unless such a power be expressly given to him. *Vide ante*, Vol. II. 412, (*b*).

COVENANT TO PERFORM AWARD AS TO COURSE OF HUSBANDRY, PAYMENTS, &c.

in the year of our Lord 18 . BETWEEN [*lessee*] of , in the county of , farmer, of the one part; and [*receiver*] the younger, of , in the same county, gentleman, of the other part. WHEREAS by indenture of lease, bearing date on or about the day of , 18 , and expressed to be made between [*lessor*], esquire, since deceased, of the one part; and the said [*lessee*], of the other part; the said [*lessor*], did demise and let, &c. (*Recite the remainder of the lease*, ut ante, Vol. II. 616.) AND WHEREAS by a deed poll, or instrument in writing, under the hands and seals of [*arbitrator*] of in the said county of , farmer; [*arbitrator*] of , in the same county, farmer; and [*other arbitrator*] of , in the said county, farmer, and bearing date on or about the day of now last past; *After reciting* as or to the effect hereinbefore recited; *And also reciting* the death of the said [*lessor*], and an appointment of the said [*receiver*], to be the receiver of the rents and profits of his real estate, and as part thereof, of the hereditaments demised by the said indenture of lease, therein and hereinbefore recited; *And also reciting*, that the said [*lessee*] had not farmed or cultivated the arable lands, part of the said farm and hereditaments so demised to him as aforesaid, according to the course prescribed by the said therein and hereinbefore recited covenant, (which is called the six years' course of husbandry); the said [*lessor*] having in his lifetime, as he the said [*lessee*] alleged, agreed to dispense with the said covenant, and to permit the said [*lessee*] to farm the said lands, in the course of husbandry called the four years' course; *And further reciting*, that the said [*receiver*], allowing to the said [*lessee*] the full benefit of the permission so stated to have been given to him as aforesaid, alleged, that the said [*lessee*] had not farmed or cultivated the said lands according to the said four years' course of husbandry; that he had done, or omitted to do, divers acts, matters, and things, contrary to, and in breach of the other covenants, conditions, and agreements contained in the said indenture of lease; whereby the lands so demised to him as aforesaid had sustained great damage; and that in consequence of such breaches, or alleged breaches, of such covenants as afore-

Parties.

Recital of a lease of a farm.

Recital of an award by three arbitrators,

COVENANT TO PERFORM AWARD AS TO COURSE OF HUSBANDRY, PAYMENTS, &c.

said, the said [*receiver*] had threatened to commence an action of ejectment against the said [*lessee*] for the recovery of the possession of the said premises; *And also reciting*, that in order to prevent such action as aforesaid, the said [*lessee*] had proposed to the said [*receiver*], and the said [*receiver*] had consented and agreed, that it should be referred to the said [*three arbitrators*], or any two of them, to settle and determine by their award, whether any, and what damage, had been occasioned to the said farm and hereditaments by reason of the matters aforesaid; *And also* to determine by their said award, what sum or sums of money (if any), should be paid by the said [*lessee*] to the said [*receiver*], as a compensation for such damages; *And also* to direct, by their said award, in what order, course, and manner, the said premises should be farmed during the remainder of the said term of twenty-one years; *And* what agreements or other assurances should be made or executed by the said [*receiver*] and [*lessee*], or either of them; *And also reciting*, that in pursuance of the said agreement, the said [*receiver*] and [*lessee*] had become bound to each other, by their several bonds or obligations in writing, bearing date on or about the day of last, to stand to, obey, observe, perform, fulfil, and keep the award and determination of the said [*three arbitrators*], which they, on any two of them should make, of and concerning the several matters and things so agreed to be referred to them as aforesaid; *And* to pay such sum and sums of money, and to make and execute such agreements, or other assurances, as the said arbitrators, or any two of them, should, by their said award, order, direct, or appoint; *The* said [*three arbitrators*] *did*, by the now reciting deed or instrument in writing, award, order, adjudge, and determine, *That* the said [*lessee*], his executors, administrators, or assigns, should pay to the said [*receiver*] the sum of hundred and pounds, as a full compensation and recompense for the damage which they found and determined to have been occasioned to the said farm and hereditaments, in consequence and by reason of the said [*lessee*] having, since the day of , 181], farmed or otherwise managed the same contrary to the said four years' course of husbandry; and

that lessee should pay receiver a certain sum, for damages, by reason of having farmed contrary to the four years' course of husbandry, and of breaches of covenants in lease:

COVENANT TO PERFORM AWARD AS TO COURSE OF HUSBANDRY, PAYMENTS, &c.

in consequence, and by reason of the breaches by the said [*lessee*], of the covenants and agreements in the said lease contained (except the said covenant to farm in the six years' course of husbandry): *And* they did thereby also award, that the costs and charges of the said bonds or obligations, and of and attending, or incident to the said reference, arbitration, and award, (which they did assess at the sum of hundred and pounds shillings and pence in the whole) should be paid by the said [*lessee*]; *And* that the said sum of hundred and pounds, the amount of such damages as aforesaid, and the sum of hundred and pounds shillings and pence, the amount of such costs, charges, and expenses as aforesaid, should be paid by him the said [*lessee*] to the said [*receiver*], as to the sum of hundred pounds, part of the said sum of hundred and pounds, and the said sum of hundred and pounds shillings and pence, the amount of such costs, charges, and expenses, on the day of then next ensuing; and as to the sum of hundred and pounds, residue of the said sum of hundred and pounds, on the day of , 18 ; *And* that the said [*lessee*] should thenceforth, for and during all the then remainder of the said term of twenty-one years so granted to him by the said recited indenture of lease, farm, cultivate, and manage the said lands and hereditaments, as well pasture as arable, in the manner, according to the course, and with the succession and alteration of crops particularly mentioned, expressed, and declared in the schedule for that purpose prepared and settled by them, and annexed to and to be considered as part of their said award; and a copy of which said award is added to or annexed to these presents: *And* they did thereby lastly award, order, adjudge, and determine, that the said [*lessee*] should, at his own expense, and on or before the day of then next, enter into a deed of covenants with the said [*receiver*], to farm, cultivate, and manage the said lands and hereditaments accordingly.

that costs of arbitration bonds, reference, and award, should be paid by lessee:

that part of the damages, and the whole of the costs, should be paid to receiver on a certain day:

and the residue of the damages on a subsequent day:

that lessee should, for remainder of term, farm according to the course mentioned in schedule:

and that lessee should, at his own expense, enter into a deed of covenant with receiver to farm accordingly.

Testatum.

Now this indenture witnesseth, that in pursuance of, and in obedience to the said recited award, *He* the said

Covenant by lessee with re-

[*lessee*] *doth* hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*receiver*], his executors and administrators, that he the said [*lessee*], his executors or administrators, shall and will, during the remainder of the said term of twenty-one years, granted by the hereinbefore in part recited indenture of lease, farm, cultivate, and manage, in a good and husbandry-like manner, the several pieces or inclosures of arable and pasture land belonging to the said farm, in such order and course, and with such succession and alterations of crops, and in every respect in such manner, as in the said schedule to the said award, and to these presents, is laid down, mentioned, and directed: And also, that he the said [*lessee*], his executors or administrators, shall and will, yearly and every year, during the remainder of the said term of twenty-one years, feed off at least sixty acres of the meadow or pasture ground demised by the said in part recited indenture of lease; *And* shall and will, at the expiration of the said term of twenty-one years, leave and yield up such of the lands mentioned in the said schedule as are thereby directed to be left in turnips in the last year of the said term (being the year 18), in a good and husbandry-like manner, summered and sown with turnip seed; and the turnips arising from which shall have been twice properly hoed; the said [*lessee*], his executors or administrators, being paid or allowed by the person or persons entitled to the said hereditaments in remainder or reversion, expectant upon the determination of the said term of twenty-one years, or his or their incoming tenant or tenants, such a sum of money as such turnips shall be valued at, within seven days after the determination of the said term, by two indifferent persons, one of them to be chosen by the said [*receiver*], his executors, administrators, or assigns, and the other of them by the said [*lessee*], his executors or administrators; or if such two indifferent persons should not agree in their valuation thereof, then by one indifferent person, to be chosen by them: And also, that he the said [*lessee*], his executors or administrators, shall and will, at the expiration of the said term of twenty-one years, leave and yield up unto the said [*receiver*], his executors, administrators, or assigns, all the hay which shall

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ceiver, to farm during the remainder of term according to the course mentioned in schedule :

and every year during remainder of term to feed off at least 60 acres of meadow or pasture ground ;

and at the end of term to leave lands directed in schedule to be left in turnips, in husbandry-like manner, sown with turnips, twice properly hoed ;

lessee being paid for same at the valuation of two referees, or their umpire :

and at the end of term, to leave all the hay which shall arise in the last year of term, properly stacked ;

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lessee being paid for same at the valuation of two referees, or their umpire:

during remainder of term, to keep all the covenants of lease, (except such as are altered by these presents);

and in every respect to perform award;

and to perform all such acts, and make all such payments, as are thereby directed to be done and made by him.

grow or arise upon or from the said demised premises, in the last year of the said term, in a proper manner, stacked, in the stack yards belonging thereto; he the said [*lessee*], his executors or administrators, being paid or allowed for the same by such person or persons as aforesaid, so much money as such hay shall be ascertained to be worth, within seven days after the expiration of the said term, by two such indifferent persons, or their umpire, as shall be chosen to value the last year's turnips as hereinbefore expressed: AND ALSO, that he the said [*lessee*], his executors and administrators, shall and will, yearly and every year during the remainder of the said term of twenty-one years, well and truly observe, perform, and keep all the covenants, provisoes, and agreements contained in the said in part recited indenture of lease (save and except such of them as are in any wise altered or varied by these presents); AND ALSO shall and will stand to and in every respect obey, perform, observe, and keep the said award of the said [*three arbitrators*]; AND do and perform all such acts, matters, and things, and make all such payments, as are thereby ordered and directed to be made, done, and performed by the said [*lessee*], his executors or administrators, at the time or times thereby appointed for the making or doing of the same. IN WITNESS, &c.

RELEASE (*a*) *by a Mortgagee to a Mortgagor, of* ALL ACTIONS AND DEMANDS, *pursuant to the Direction of an Award; excepting a Warrant of Attorney, directed by the Award to be given by the Mortgagor to the Mortgagee.*

RELEASE OF ALL DEMANDS EXCEPT WARRANT OF ATTORNEY

KNOW ALL MEN, BY THESE PRESENTS, *That* I [*mortgagee*], of in the county of , mercer, *have* remised, released, and for ever quitted claim; *And* by these presents *do* remise, release, and for ever quit claim, unto [*mortgagor*], of , in the said county, gentleman, his heirs, executors, and administrators, *All* actions, cause and causes of action, judgments, suits, controversies, trespasses, debts, duties, damages, accounts, reckonings, and demands whatsoever, for or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the day of last; *save and except* a certain warrant of attorney, directed to be executed to me by the said [*mortgagor*], in and by a certain award, made this day of , 18 , by [*arbitrator*], esquire, of, &c. barrister at law, on a reference to him of all disputes between me and the said [*mortgagor*]. IN WITNESS whereof I have hereunto set my hand and seal, the day of , in the year of our Lord 18 .

Release by mortgagee to mortgagor, of all actions and demands;

excepting a warrant of attorney, directed by award to be given by mortgagor to mortgagee.

Testimonium.

SIGNED, SEALED, AND DELIVERED, (being first duly stamped (*b*)) in the presence of

Attestation.

(*a*) This release is made pursuant to the direction in the award, *ante*, 58. Award.

(*b*) Stamp one pound fifteen shillings; progressive duty one pound five shillings. 55 Geo. III. c. 184. Sched. Part I. title DEED. Stamp.

RELEASE OF ALL DEMANDS, EXCEPT RIGHT TO REDEEM.

RELEASE (*a*) *by a Mortgagor to a Mortgagee, of* ALL ACTIONS AND DEMANDS, *pursuant to the Direction of an Award; excepting his Right to Redeem, in the Manner prescribed by the Award.*

Release by mortgagor to mortgagee, of all actions and demands;

KNOW ALL MEN BY THESE PRESENTS, *That* I [*mortgagor*], of in the county of , gentleman, *have* remised, released, and for ever quitted claim; *And* by these presents *do* remise, release, and for ever quit claim, unto [*mortgagee*], of , in the said county, mercer, his heirs, executors, and administrators, *All* actions, cause and causes of action, judgments, suits, controversies, trespasses, debts, duties, damages, accounts, reckonings, and demands whatsoever, for or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the day of last; *save and except* my right to redeem a certain farm, now in mortgage to the said [*mortgagee*], at the time, under the terms, and in the manner prescribed in and by a certain award, made the day of , in the year , by [*arbitrator*], esquire, of, &c. barrister at law, on a reference to him of all disputes between me and the said [*mortgagee*]. IN WITNESS, &c. (*ut ante*, 155.)

excepting his right to redeem in the manner prescribed by award.

Award.

(*a*) This release is made pursuant to the direction in the award, *ante*, 58.

BANKRUPTCY.

For BANKRUPTCY, see title TRUSTS FOR CREDITORS.

BARGAIN AND SALE FOR A YEAR.

LEASE AND RELEASE.

Origin of the conveyance by lease and release.

The form of the conveyance by lease and release, is originally derived to us from the common law; and it is necessary to distinguish in what respect it operates as a common-law conveyance, and in what it operates under the statute of uses. At the common law, where the usual mode of conveyance was by feoffment with livery of seisin, if there were a tenant in possession, so that livery could not be made, the reversion was granted, and the tenant attorned to the reversion. As by this mode the reversion or remainder of an estate might be conveyed without livery, when it depended on an estate previously existing, it was natural to proceed one step further, and to create a particular estate for the express and sole purpose of conveying the reversion; and then, by a surrender or release, either of the particular estate to the reversioner, or of the reversion to the particular tenant, the whole fee vested in the surrenderee or releasee. It was afterwards observed, that there was no necessity to grant the reversion to a stranger; and that if a particular estate were made to the person to whom it was proposed to convey the fee, the reversion might be immediately released to him; which release, operating by way of enlargement, would give the releasee the fee. In all these cases, the particular estate was only an estate for years; for at the common law, the ceremony of livery of seisin is as necessary to create an estate of freehold, as it is to create an estate of inheritance. Still an actual entry would be necessary on the part of the particular tenant; for, without actual possession, the lessee is not, at common law, capable of a release, operating by way of enlargement. Butl. n. Co. Litt. 271. b. Litt. sec. 459. *Lutwich* v. *Mitton*, Cro. Jac. 604. For before entry, the lessee has but *interesse termini*, an interest of a term, and no possession, and therefore a release which enures by way of enlarging an estate created by a lease at common law, cannot work without a possession, for before possession there is no reversion. But to the va-

Actual entry by the lessee is necessary previous to a release at common law.

lidity of a release at common law, it is not necessary that the estate to be enlarged should be actually in possession; but only that it should be a *vested* estate, severed from the reversion. For Lord Coke says, that if a man make a lease for years, the remainder for years, and the first lessee enters, a release to him in *remainder* for years, is good to enlarge his estate. Co. Litt. 270. a. (3).

However, this necessity of entry for the purpose of obtaining the possession, was superseded, or made unnecessary, by the statute of uses; for, by that statute a vested right to the possession was immediately transferred to the *cestui que use;* so that a bargainee under the statute has a vested estate, and is as capable of a release before or without entry, as a lessee is at the common law after entry. And a bargainee for years has, by the instantaneous operation of the statute, an actual vested estate, even although the bargain and sale be by a mere writing neither indented nor enrolled, because the statute of enrolments does not extend to leases for years. 2 Inst. 671; *Heyward's* case, 2 Co. 36; *Foxe's* case, 8 Co. 94. All, therefore, that remained to be done, to avoid, on the one hand, the necessity of livery of seisin from the grantor; and, on the other, the necessity of an actual entry on the part of the grantee, was, that the particular estate (which, for the reasons above-mentioned, should be an estate for years) should be so framed, as to be a bargain and sale within the statute. This mode of conveyance by bargain and sale, and a release in enlargement, was first practised and contrived by Sir Francis Moore, serjeant at law, at the request of Lord Norris, in order that some of his relations might not know what settlement he had made of his estate. Phillips on Capias and Process of Outlawry, 115. Barrington on the Ancient Statutes, 133, 5th ed. 2 Bla. Com. 339. Originally it was made in such a manner as to be both a lease at the common law, and a bargain and sale within the statute. But as it is held, that where conveyances may operate both by the common law, and statute, they shall be considered to operate by the common law, unless the intention of the parties appears to the contrary, it became the practice to insert among the operative words, the words *bargain and sell*, (in fact, it is more accurate to insert no other operative words,) and to express that the bargain and sale, or lease, is made to the intent and purpose, that thereby, and by the statute of uses, the lessee may be capable of receiving a release. 4 Bac. Abr. 185, Gwill. ed. *Leases* (M). The bargain and sale, therefore, or the lease for a year, as it is generally called, operates, and the bargainee has a vested estate by the statute, divided from the reversion; but he cannot bring an action of trespass without entry and an actual possession. *Barker* v. *Keat*, 2 Mod. 251;

But a bargainee under the statute of uses, has a vested estate, and is capable of a release in enlargement without entry.

"Bargain and sell" alone, are the proper words in a bargain and sale for a year.

Lutwich v. *Mitton*, Cro. Jac. 604; Shep. Touchs. 223. For although the bargainee be possessed of an *estate* in the land, yet he is not in possession *of the land*, until he has entered by virtue of the bargain and sale. Therefore the usual expression, in the bargain and sale, and in the release "in the actual possession," is not strictly correct, unless by possession be meant only estate. For the bargain and sale cannot by its own operation give the bargainee the actual possession; it only gives him an actual estate, and a right to the possession. 2 Pres. Conv. 390, 445; *ante*, Vol. II. 98. The release operates by enlarging the estate of the bargainee to a fee: this is at common law; and if the use be declared to the releasée in fee simple, it continues an estate at the common law; but if the use be declared to a third person, the statute again intervenes, and annexes or transfers the estate or right to the possession in the releasee, to the use of the person to whom the use is declared. Butler's Fearne, 417. It has been said, that the possession of the bargainee, under the lease, is not so properly merged in, as enlarged by the release: but, at all events, it does not, after the release, exist distinct from the estate passed by the release.

The expression that the bargainee is "in the actual possession," is not strictly correct.

If the use be declared to the releasee in fee, it is an estate at common law.

As the operation of a bargain and sale and release, depends upon the bargain and sale, the bargainor must be a person capable at law of being seised to an use; for otherwise the release will be void for want of an estate in the releasee. By some very respectable authorities, it has been said that a corporation cannot be seised to an use. Pop. 72; 1 Co. 127. a.; Bacon on Uses, 57, 42; Plowd. 102, 538; Jenk. Cent. 195; 2 Vern. 399; Gilb. Uses, 5, 170, 285; Shep. Touchs. 508. A contrary doctrine, so far as relates to the conveyances of corporations by bargain and sale, seems to be laid down in Sir *Thomas Holland* v. *Bonis*, 1 Leon. 183; 2 Leon. 121; 3 Leon. 175; and see 13 H. 7. fol. 9. pl. 5. Butl. n. Co. Lit. 271, b. And the better opinion seems to be, that although on a conveyance to a corporation a use cannot arise on their seisin to the use of others, yet that a corporation may create a use out of their own seisin by bargain and sale, either in fee or for years, and that the statute will transfer or turn the use so created into a vested estate; or in simpler language, they may convey their own estates by a conveyance operating under the statute of uses. Sug. Gilb. Uses, liii—iv, 8, 10; Com. Dig. *Bargain and Sale*, (B. 3.) But upon a conveyance *by* a corporation, to obviate any doubt, the conveyance is made by feoffment with livery of seisin, or by a lease at common law, whereupon an actual entry is made, followed by a release. Either of these modes avoids the question on the statute; the last as well as the first operates purely at common law, for the lease (which should not contain the words *bargain and sell*, but *grant and demise*) has simply a common law operation, and after the lessee has actually entered, he is capable of a release enuring by way

On a conveyance *to* a corporation, a use cannot arise on their seisin to the use of others; yet it seems, a corporation may create a use out of their own seisin by bargain and sale:

but to avoid doubt on this point, corporations convey by feoffment, or lease and release at common law.

of enlargement, and entirely independent of the statute. A stranger may be made the lessee and releasee in the same way as in the case of a conveyance under the statute, and uses may be declared of his seisin just as if the conveyance had been made by a person capable of standing seised to a use. The declaration at the end of the lease for a year, instead of being in the common form, should be to the effect, that the demise is made "to the intent, that by virtue of these presents, and *an entry* to be made by force of the grant or demise hereby made, the said [*grantee*] may be in the actual possession," &c. And on the lease a memorandum of the entry should be made. 2 Pres. Conv. 258, 446. See the forms, *post*, 175, 178. The usual reference in the release to the bargain and sale for a year, and the statute, should be omitted, and in lieu of it should be inserted a reference to the lease for a year, under which it should be stated that the lessee is in actual possession by force of an entry made subsequently to its execution, but previously to the execution of the release. Sug. Gilb. Uses, 8. See the usual form of the RELEASE, *post*, title PURCHASE.

A lease and release does not create a discontinuance, or a forfeiture,

A conveyance by lease and release, is, like a bargain and sale, and covenant to stand seised, what is termed an innocent conveyance. It will not, therefore, create a discontinuance; Litt. s. 598, 606, *Machel* v. *Clarke*, 2 Ld. Raym. 778, or operate as a forfeiture; Litt. s. 600. *Saunders* v. Lord *Annesley*, 2 Scho. & Lefr. 99; or destroy a contingent remainder, Fearne 246, 3d ed.; although it may exclude a contingent remainder, by uniting the particular estate with the reversion; Sug. Gilb. Uses, 232, Butler's Fearne, 322: nor will it operate as a destruction of a power in gross; *Phitton's* case, cited Hard. 412, Sug. Pow. 61, 3d ed.; or a power appendant or appurtenant. *Long* v. *Rankin*, *ante*, Vol. II. 313.

or destroy a contingent remainder,

or a power in gross, appendant or appurtenant.

In practice the lease and release are always separate deeds.

The lease and release are at this day always separate deeds; but, it is said, that they *may* be contained in the same deed; for North C. J. said, that he *had known it ruled several times*, that a lease and release in the same deed was a good conveyance, for priority should be supposed. 1 Freem. 251. Sug. Gilb. Uses, 229. 2 Pres. Conv. 366.

Reversion and remainder.

As to the conveyance of a reversion or remainder in fee, by lease and release, *vide ante*, Vol. II. 96, (*a*). The proper mode of conveying rent charges, tithes, advowsons, and other estates lying in grant, is by grant at common law: Shep. Touchs. 230: nor is it usual when they are conveyed separately from other property, to use any other mode of assurance. 2 Pres. Conv. 235. They may however be effectually conveyed by lease and release. 2 Sand. Uses, 26, 3d ed.

Estates lying in grant pass by grant alone.

LEASE FOR A YEAR.

The date and execution.

The lease for a year is generally dated on the day next before the day of the date of the release. It is ordinarily also executed by each person, grantor in the lease, before the execution by that person of the indenture of release grounded on the lease. This is the correct practice, and should be observed as closely as circumstances will admit. The material point is, that the lease for a year should give a *vested* estate, capable of enlargement, and be subsisting at least in legal intendment as a vested estate, prior to the execution of the deed of release. This is evident from the preliminary observations. Of course no objection can arise from the circumstance that the lease for a year is dated at a more distant period than one day prior to the date of the release. Sometimes, indeed, even in modern practice, there is an interval of a day between the day of the date of the lease, and the day of the date of the release, instead of having the lease and release dated on successive days. This happens from the caution of not dating the lease or release on a Sunday. But a deed dated, or even executed on a Sunday, is binding, and free from all well founded objection. The statute for the better observance of the Lord's day, 29 Car. II. chap. 7, applies to process and proceedings of the courts, and dealings in the course of trade, and not to the private transactions of individuals, as between themselves, by way of conveyance without the interposition of the courts, as in the case of fines and recoveries; transactions which are invalidated by the rules of the common law, when they appear to have taken place on a Sunday, for *dies dominicus non est juridicus*. Wingate's Maxims, 7; Noy's Maxims, 2; Co. Litt. 135. a; 2 Saund. 291. [See *Sandeman* v. *Breach*, 7 Barn. & C. 96. But see *Fennell* v. *Ridler*, 5 B. & C. 406, where it was held, that the 29 Car. II. c. 7. ought to receive an extended construction, and applied to private bargains. See also *acc. Bloxsome* v. *Williams*, 3 B. & C. 232, and *Smith* v. *Sparrow*, 4 Bing 84. *Ed.*]

Conveying parties.

All persons who are to convey any estate, and could not convey that estate at the common law without livery of seisin, must necessarily be lessors or grantors in the lease. This instance may be understood, as that alone in which there is any absolute occasion for a lease for a year from conveying parties, since under any other circumstance, the intended conveyance may operate as a grant. In strictness, therefore, the omission in the lease of those persons, who might transfer their estate by grant without livery of seisin, is not so material as to raise

an objection to a title; for the release may operate as a grant, though it cannot be effectual as a release; and it may as to some persons operate as a release, and as to others as a grant. And it seems that in all conveyances by persons who are merely *cestuis que trust*, the lease for a year is not essentially necessary as part of their assurance; since at the common law, they could not have conveyed by livery of seisin; and since also any instrument which expresses an intention to transfer the beneficial ownership from one person to another, is effective in a court of equity. Butl. n. Co. Litt. 290. b. (l) xiv. For "equity regards not the circumstance, but the substance of the act." Francis's Maxims, 53. But from caution, it is the uniform practice of conveyancers to make the *cestuis que trust*, and all persons who are to join in the release as conveying parties, lessors in the lease. However, it seems clear that in regard to the conveyance of equitable interests, the lease for a year is used from analogy, rather than principle, or necessity; and that any interest merely equitable, as it may pass without livery of seisin, may pass by a single deed, operating in the nature of a grant, and without inrolment, or other external ceremony. Persons who are merely to release a right or title, or collateral charge even at law, are never, merely on that account, made parties to the lease, when it is prepared with due attention to form. At the same time it is safer to make such persons parties, especially in doubtful cases. And in taking a release from an heir at law, in confirmation of the title of a devisee, or to supersede the necessity of proving the will; and also when former owners become parties to release some charge or incumbrance, or to afford evidence of earlier transactions, it is, in all cases, advisable to have the conveyance by lease and release, rather than a simple release of right, or a confirmation.

The bargainee should be the releasee.

The bargainee in the lease for a year, should be the person who is to be the releasee in the release. And when there are to be several releasees, these several persons should be bargainees.

A valuable consideration is essential to a bargain and sale.

To every bargain and sale, it is essential that there should be a valuable consideration; *Mildmay's* case, 1 Co. 176, a; 2 Inst. 671—2; it may be either money, or money's worth: *Wiseman's* case, 2 Co. 15, a; Shep. Touchs. 511; Sug. Gilb. Uses, liv. 95, (5): but it is not by any means necessary, as it has been sometimes stated, that there should be a *pecuniary* consideration. Gilb. Uses, 47, 285; 2 Bla. Com. 339; 4 Cru. Dig. 123, s. 5, 127, s. 22, 128, s. 25, 145, s. 15, 2d ed. 2 Sand. Uses, 45, 3d ed. A horse, a rent reserved, &c. are valuable considerations, and will raise the use on a bargain and sale. Hence it has been held, that the reservation of a peppercorn rent in the bargain and sale will, in the absence of a pecuniary consideration, be sufficient to answer this requisite. *Barker* v. *Keate*, 2 Mod. 253; 1 Freem. 249. But the consideration of a long acquaintance, or of friendship, 2 Roll.

Abr. 783; or of natural love and affection, *Osborn* v. *Churchman*, Cro. Jac. 127; or of marriage, *Crossing* v. *Scudamore*, 1 Vent. 137; or that the bargainee is bound in a recognizance for the bargainor, *Ward* v. *Lambert*, Cro. Eliz. 394, cannot create a use upon a bargain and sale. [But the consideration may be proved *aliunde*. Moore, 569. 2 Roll. Abr. 786].

The lease should include all the parcels intended to be comprised in the release; for if any of the parcels are omitted to be granted, there will not, as to the omitted parcels, be any estate to be enlarged by the release. It follows, that when there is any omission of parcels in the lease, the assurance cannot, as to the omitted parcels, operate as a lease and release; and therefore, as to the omitted parcels, it will be void, unless the intended release can operate in some other mode: and in this place it is to be remembered, that every release is and may operate as a grant; but every grant is not necessarily a release, or operative as such. *Vide ante*, Vol. I. 452, (*c*). When parcels are to be conveyed in the release by a full description, or even by general words, the same description, or one to the same effect, should be introduced into the lease: and when the parcels are, in the release, to be granted by words of reference to a schedule, except such schedule is merely for identity, a similar schedule as an accumulative description should be added to the lease, or the parcels in the schedule should, in that case, be transcribed as the parcels in the lease. When the parcels are granted in the release by words of reference to a more full description, contained in a recital, the parcels in the lease should be taken from the deed so recited, or so many of them should be taken as are to be conveyed by the release. Mr. Preston says, when the parcels are long, or the description of them is rendered complicated by words of reference, it will frequently be found convenient, and, in point of expense, highly prudent, to have the lease indorsed on the release, and to describe the parcels by means of a reference to the release. The description, he says, may be in these words, or to this effect:—"All those "manors, &c. which are mentioned or described in the within written "indenture or instrument; being the hereditaments expressed and in- "tended to be thereby released, or otherwise assured unto the said "[*bargainee*], as in the same indenture or instrument is particularly "mentioned; and every part, &c. with their and every of their rights, royal- "ties, members, and appurtenances." 2 Prest. Conv. 361. But it seems, that this suggestion cannot be safely followed, on account of the doubt whether parcels can be conveyed by means of a reference to a deed not executed, and consequently not having, at the time of reference, any operative force. When the parcels are long, and the description is not ne-

The lease should include all the parcels intended to be comprised in the release.

cessarily by recitals, or when the parcels are described by means of a long schedule, expense may be saved by setting them forth in the lease for a year, and in the release referring to the description in the lease. This mode of reference seems to be free from every objection. To the parcels of the lease, the general words should, in all cases, be added: and if there be any sweeping clause, namely, general words of "all messuages," &c. these, or the substance of them, should be included in the lease. The clause of the "reversion" is generally added: it is a formal, not a necessary part of this instrument. The clause of "*All* the estate," should uniformly be omitted. This clause is proper in those instruments only which pass all the estate of the grantor; and is informal in instruments creating a particular estate. *Vide ante*, Vol. II. 314—318.

Habendum. In modern practice, the habendum is generally made for one year. Hence this part of the assurance is usually denominated the lease, or bargain and sale for a year. It is, however, immaterial whether the grant be for a year, or for any longer or shorter period. The only caution to be regarded, is to limit the term, so that the same may be an actual, vested, and continuing estate, capable of enlargement at the execution of the release, and not merely a future interest, or an *interesse termini*. With a view to this caution, the lease is generally made to hold "from the day next before the day of the date," and it will be proper to adhere to this form. But even though the habendum were to hold henceforth, from the date, or from the making, the lease would immediately, on the execution thereof, give an estate capable of enlargement; and this is the object to be attained.

Reddendum. The reservation of rent, is a formal, and not an essential part of a lease for a year, provided there be a consideration of money, or of money's worth. This clause was introduced into general practice in consequence of the determination in *Barker* v. *Keat*, 2 Mod. 249, that a lease made with a reservation of a rent, was, in respect of the rent, a lease for a valuable consideration, and might be used as a bargain and sale. It follows, that when there is an express or valuable consideration in the testatum part of the deed, the omission of the reddendum, or clause reserving the rent, affords no objection against the validity of the assurance as a bargain and sale. It is the usual practice to reserve the rent generally during the term, because the law will appropriate the rent to the person to whom it ought to have been reserved. *Whitlock's* case, 8 Co. 71, a. Co. Litt. 47, a. The rent generally reserved is a peppercorn; but it may be money, a grain of wheat, or the like.

Declaratory clause. The declaratory clause, expressing the intention with which the

lease is made, is also a formal, and not an essential part of the assurance. Of course the omission of it would not invalidate the instrument, while a due observance of the usual practice will suggest the propriety of its insertion. 2 Pres. Conv. 361—389.

Recital of a lease for a year sufficient as to lands in Ireland.

As to lands in *Ireland*, the recital of a lease for a year in the deed of release is sufficient evidence of the lease; and therefore no lease for a year is prepared. *Vide ante*, Vol. I. 397, (*a*).

A recorded conveyance equal to livery and seisin in Antigua, Saint Vincent, Jamaica, &c.

A recorded conveyance is equal to livery and seisin, in Antigua and the islands thereto adjacent and belonging. *Ante*, Vol. II. 221, 231. The law is the same in Saint Vincent. Registry act for Saint Vincent, s. 23, 24. Shepherd's Practice of Saint Vincent, 118; and it seems, the law is the same in Jamaica, *Goffe* v. *Elkin*, 2 Mod. 240, and the other West Indian colonies. Where the law is as above mentioned, a lease for a year is unnecessary; *vide ante*, Vol. II. 222, n. *; however, some persons prepare a lease for a year; but upon what principle it is difficult to conceive. Whether the conveyance be by bargain and sale, grant, or lease and release, to ensure its ultimate validity, it must be registered within the time prescribed by the particular Colonial Registry Act. See directions as to the schedule of registered slaves, to be inserted in a conveyance, mortgage, &c. *ante*, Vol. II. 247.

TO PRECEDE A RELEASE TO PREVENT DOWER, OR A RELEASE AT COMMON LAW.

BARGAIN AND SALE FOR A YEAR, *adapted to a Common Appointment and Release, or a Release alone, to Uses to prevent Dower; or to a Release in Fee at Common Law.*

Parties.

Testatum.

Bargain and sale by vendor and his trustee to prevent dower.

Parcels.

THIS INDENTURE, made the day of in the year of our Lord 18 , BETWEEN [*vendor*], of in the county of Sussex, , of the first part; [*trustee to prevent dower* (*a*)], of the same place, , of the second part; and [*purchaser*], of Street, in the city of London, , of the third part. WITNESSETH, that in consideration of five shillings of lawful money current in Great Britain [and Ireland], paid (*b*) to each of them the said [*vendor*] and [*trustee to prevent dower*], by the said [*purchaser*], at or before the sealing and delivery of these presents; the receipt whereof respectively is hereby respectively acknowledged; *They* the said [*vendor*] and [*trustee to prevent dower*] *have*, and each of them *hath* bargained and sold; *And* by these presents *do* and each of them *doth* bargain and sell unto the said [*purchaser*], his executors, administrators, and assigns, ALL THOSE, &c.

Whether a purchaser can in all cases insist on the concurrence of the trustee to prevent dower, appears doubtful.

(*a*) Whether a purchaser is in all cases entitled to insist upon the concurrence of the trustee to prevent dower, is, perhaps, not a clear point. Some gentlemen invariably make the trustee join with the vendor in the lease and release; while other gentlemen invariably dispense with the concurrence of the trustee.

ONE CONVEYING PARTY.

(*b*) If there be only one conveying party, say,

"paid to him the said [*vendor*], by the said [*purchaser*], at or before the sealing and delivery of these presents; the receipt whereof is hereby acknowledged; *He* the said [*vendor*], *hath* bargained and sold; *And* by these presents *doth* bargain and sell unto," &c. *ut supra.*

(*as in the appointment and release*): AND all houses, &c. AND the reversion, &c. (*omitting the clause of* "all the estate," &c.) TO HAVE AND TO HOLD the said messuages, tenements, hereditaments, and premises hereby bargained and sold, or intended so to be, and every part and parcel thereof, with their appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, from the day next before the day of the date of these presents, for the term or time of one whole year thence next ensuing, and fully to be complete and ended. YIELDING AND PAYING therefore, the rent of one peppercorn, on the last day of the said term, if the same rent should be lawfully demanded. *To the intent* and purpose that by virtue of these presents, and by force of the statute made for transferring uses into possession, the said [*purchaser*] may be in the actual possession of all and singular the said messuages, tenements, hereditaments, and premises hereby bargained and sold, or intended so to be, and every part and parcel thereof, with their appurtenances; and be thereby enabled to accept and take a grant and release of the reversion and inheritance of the same premises, to him (*c*) and his heirs. *To* (*d*) *such Uses*, upon such trusts,

TO PRECEDE A RELEASE TO PREVENT DOWER, OR A RELEASE AT COMMON LAW.

Habendum for a year.

Reddendum a pepper corn.

To the intent that purchaser may be enabled to take release of the reversion,

to uses to prevent dower.

(*c*) If it be a release at common law, the form may be, RELEASE AT COMMON LAW.

"to him, his heirs and assigns for ever. IN WITNESS," &c.

Or,

"to him, his heirs and assigns, in such manner and form as shall be expressed in and by an indenture intended to bear date on the day next after the day of the date, and executed after the execution of these presents, and to be made between the said [*vendor*] of the one part, and the said [*purchaser*] of the other part. IN WITNESS," &c.

Or,

"to him the said [*purchaser*], his heirs and assigns; *To the only proper use and behoof* of him the said [*purchaser*], his heirs and assigns for ever, by indenture already pre-

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(*d*) Or it may be more shortly expressed thus: Short reference to the uses of release.

"*To the uses*, and for the intents and purposes to be de-

TO PRECEDE A RELEASE TO PREVENT DOWER, OR A RELEASE AT COMMON LAW.

and for such ends, intents, and purposes, as shall be limited, expressed, and declared, of and concerning the same, in or by a certain indenture of appointment and release already prepared, and to be executed after the execution of these presents; the said indenture of appointment and release being made or expressed, or intended to be made, between the said [*vendor*] of the first part; the said [*trustee to prevent dower*], of the second part; the said [*purchaser*], of the third part; and [*purchaser's trustee to prevent dower*], of Street aforesaid, of the fourth part. IN WITNESS, &c.

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pared, and intended to bear date the day next after the date of these presents, and to be made between the said [*vendor*] of the one part, and the said [*purchaser*] of the other part. IN WITNESS," &c.

On a release to A. to the use of A. he is in by the common law.

For if on a lease at common law, or a bargain and sale for a year, and a release in enlargement, the use be declared on the seisin of A. the releasee, to the use of A.; or unto and to the use of A., he is in by the common law, and not by the statute: the reason of which is, that whenever an estate may take effect either by the rules of the common law, or by the statute of uses, the common law is preferred. *Vide ante*, 158, 159; Noy's Tenures, 306, 6th ed. [Sugden on Powers, 128. Sanders Us. & Tr. 156, *et post*, 505.]

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clared by another indenture already prepared, and intended to be dated the day next after the day of the date hereof. IN WITNESS," &c.

BARGAIN AND SALE FOR A YEAR, *to precede a Release of an Estate in* POSSESSION, *or of a* REVERSION *or* REMAINDER *in Fee by several, either to Uses to prevent Dower, or to the Trustees of a Settlement, or to a Mortgagee, or Grantee of an Annuity, with Trusts for Sale, &c.*

TO PRECEDE A RELEASE OF THE POSSESSION OR REVERSION BY SEVERAL, TO USES TO PREVENT DOWER OR TO TRUSTEES, &C.

THIS INDENTURE, made the day of , in the year of the reign of George the Fourth, &c. and in the year of our Lord 18 . BETWEEN [*trustee*], of Lincoln's Inn Fields, in the parish of St. Giles in the Fields, in the county of Middlesex, barrister at law, [*trustee*], of Saville Row, in the parish of St. James, Westminster, in the said county of Middlesex, surgeon; [*trustee*], of Brentford, in the said county of Middlesex, surgeon; [*other trustee*], of Lincoln's Inn, in the said county of Middlesex, barrister at law; and [*husband*], of street, in the said parish of St. James, Westminster, esquire, of the one part; and [*purchaser*], of street, Edgeware Road, in the parish of St. Mary-le-Bone, in the said county of Middlesex, esquire, of the other part. WITNESSETH, that in consideration of five shillings of lawful money of Great Britain [and Ireland], to each of them the said [*four trustees*] and [*husband*], paid by the said [*purchaser*], at or before the sealing and delivery of these presents, (the receipt whereof is hereby respectively acknowledged); *The* said [*four trustees*] and [*husband*] *have*, and each and every of them *hath* bargained and sold; *And* by these presents *do*, and each and every of them *doth* bargain and sell unto the said [*purchaser*], his executors, administrators, and assigns (*a*), ALL THAT piece or parcel

Parties.

Testatum.

Bargain and sale by five.

Parcels.

(*a*) If it be a bargain and sale of a reversion or remainder, and it be conveyed as such, the form may be:

BARGAIN AND SALE FOR A YEAR OF A REVERSION OR REMAINDER.

"ALL THAT the reversion or remainder in fee simple, ex-

TO PRECEDE A RELEASE OF THE POSSESSION OR REVERSION BY SEVERAL, TO USES TO PREVENT DOWER, OR TO TRUSTEES, &c.

of ground; AND ALL THAT messuage or tenement, erected and built thereon, and now in the occupation of the said [*husband*], situate, standing, and being in street, in the said parish of St. James, Westminster, in the said county of Middlesex, and numbered 46 in front, towards the said street, and numbered 244 on the general plan of the estate in Westminster, late belonging to , deceased: AND all houses, outhouses, edifices, buildings, stables, sheds, yards, gardens, fences, drains, ways, paths, passages, waters, watercourses, lights, liberties, easements, profits, privileges, commodities, advantages, emoluments, rights, members, and appurtenances whatsoever to the said messuage or tenement, hereditaments, and premises, or any of them, or any part or parcel thereof belonging, or in any wise appertaining; or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or of any part thereof: AND the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the same messuage or tenement, hereditaments and premises, and every part and parcel thereof. TO HAVE AND TO HOLD the said messuage or tenement,

General words for a house in London.

And the reversion, &c.

Habendum for a year.

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pectant on the determination of the estate for life of [*tenant for life*], of, &c. of and in ALL THAT, &c. AND ALSO of and in ALL houses, &c. TO HAVE AND TO HOLD the said reversion or remainder of the said premises expectant as aforesaid, with the rights, &c. YIELDING AND PAYING, &c. *To the intent* and purpose, that by virtue of these presents, and by force of the statute made for transferring uses into possession, the said reversion or remainder of the said premises expectant as aforesaid, may be actually vested in the said [*bargainee*]; and that he the said [*bargainee*] may be enabled to accept and take a grant and release of the inheritance thereof, to him and his heirs," &c.

Sed vide ante, Vol. II. 96, (*a*).

A reversion or remainder should be limited to uses to prevent dower.

Although the conveyance be of a reversion or remainder in fee, yet the estate should be limited to uses to prevent dower; for otherwise, when the reversion or remainder becomes an estate in possession, a right to dower will attach.

hereditaments, and all and singular other the premises hereby bargained and sold, or intended so to be, with the rights, members, and appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, from the day next before the day of the date of these presents, for the term or time of one whole year thence next ensuing, and fully to be complete and ended. YIELDING AND PAYING therefore, the rent of one peppercorn, on the last day of the said term (if the same should be lawfully demanded); *To the intent* and purpose, that by virtue of these presents, and by force of the statute made for transferring uses into possession, the said [*purchaser*] may be in the actual possession of all and singular the messuage or tenement, hereditaments, and premises, hereby bargained and sold, or intended so to be, with their rights, members, and appurtenances; and be thereby enabled to accept and take a grant and release of the reversion and inheritance of the same premises, to (*b*) him, and his heirs, *To such uses*, and in such manner and form, as shall be expressed in and by an indenture, already prepared, and intended to bear date on the day next after the day of the date, and executed after the execution of these presents; and to be made between the said [*four trustees*], of the first part; the said [*husband*] and his wife, of the second part; [*surrenderor of term*], of Street, Tottenham Court Road, in the said county of Middlesex, carpenter, of the third part; the said [*purchaser*], of the fourth part; and [*trustee to prevent dower*], of in the county of , , of the fifth part. IN WITNESS, &c.

TO PRECEDE A RELEASE OF THE POSSESSION OR REVERSION BY SEVERAL, TO USES TO PREVENT DOWER, OR TO TRUSTEES, &c.

Reddendum a pepper corn.

To the intent that purchaser may be enabled to take a release of the reversion.

To uses to prevent dower.

(*b*) If the conveyance be to the trustees of a settlement, or to a mortgagee or grantee of an annuity with trusts for sale, &c., say, "to them the said [*trustees*] and their heirs, *To such uses*, upon such trusts, and for such ends, intents, and purposes, and with, under, and subject to such powers, provisoes, declarations, and agreements, as shall be expressed," &c., *ut supra*.

TO TRUSTEES OF SETTLEMENT, &c.

TO PRECEDE RELEASE OF ESTATE FOR LIVES OR LIFE.

BARGAIN AND SALE FOR A YEAR; *to precede a Release* (*a*) *of an Estate for Lives, or for the Life of the Vendor, either to the Purchaser, or to the Trustees of a Settlement.*

THIS INDENTURE, made the day of in the year of the reign, &c. and in the year of our Lord, 18 ; BETWEEN [*vendor*] of, &c. [*vendor*] of, &c. and [ ] his wife, of the one part; and [*purchaser*] of, &c. of the other part; WITNESSETH, that in

Parties.

Testatum.

On the transfer and surrender of estates for lives.

(*a*) An estate for a life or lives, in lands in *possession*, may be transferred by a recovery, fine, feoffment, lease and release, bargain and sale enrolled, or covenant to stand seised. As to the necessity for livery, or something tantamount to it, on the creation of such an estate, *vide ante*, Vol. II. 308.

An estate of freehold in corporeal hereditaments, may be created or transferred by *grant*, when the party has merely a reversion or remainder. Incorporeal hereditaments may, in all cases, be transferred, or an estate of freehold in them be created, by *grant*. Pres. Watk. Conv. 32. 36, 3d ed.

An estate of freehold, of lands in possession, may be surrendered to the immediate reversioner, or remainder man, by deed, or note in *writing*, without livery of seisin, or any thing tantamount to it. Co. Litt. 338, a. Com. Dig. *Surrender* (B). 29 Car. II. c. 3. s. 3. *Doe* dem. *Wolley* v. *Pickard*, *ante*, Vol. I. 455. [See *Williams* v. *Sawyer*, 3 Brod. and Bing. 70; and 6 J. B. Moore, 226. S. C.] But an estate for life of things lying in *grant*, as of a rent, or of an estate in remainder or reversion for life, cannot be surrendered without *deed*. As surrenders by operation of law are expressly reserved by the statute of frauds, they remain as they were at common law. Therefore, if a lessee for life accepts a valid lease in writing from the lessor, though it be only for years, it will be a surrender in law. Wms. n. 1 Saund. 236. *a*. and *b*.

But when a married woman has an estate of freehold in lands, either in possession or reversion, or in an incorporeal hereditament, a fine or a

consideration of five shillings of lawful money current in Great Britain [and Ireland], paid to (*b*) each of them the said [*vendor*], and [*vendor*] and [ ] his wife, by the said [*purchaser*], at or before the sealing and delivery of these presents; the receipt whereof is hereby respectively acknowledged, *They* the said [*vendor*], and [*vendor*] and [ ] his wife, *have*, and each and every of them *hath*, bargained and sold; *And* by these presents *do*, and each and every of them *doth* bargain and sell unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT messuage or tenement, lands, and premises, situate and being at , in the county of , (with the) [*or* TOGETHER with all out-houses, edifices, buildings, barns, stables, yards, gardens, orchards, lights, easements, ways, waters, watercourses, commons, commodities, privileges, emoluments, advantages, hereditaments, and] appurtenances whatsoever, to the said messuage or tenement, lands and premises belonging, [or in any wise appertaining, or accepted, reputed, taken, or known as part, parcel, or member thereof. [AND the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits (thereof, [*or* of the said messuage or tenement, lands, and premises hereby bargained and sold, or intended so to be, and every

TO PRECEDE RELEASE OF ESTATE FOR LIVES OR LIFE.

Bargain and sale.

Parcels.

General words.

And the reversion, &c.

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recovery, in which she must be vouched, is requisite to transfer it. Pres. Watk. Conv. 230, 3d ed. and the authorities cited, *ante*, Vol. I. 159, 160. A fine is the most usual conveyance for this purpose, excepting where a recovery is requisite for some other purpose. A fine alone is sufficient, without any other conveyance. *Vide ante*, Vol. II. 310. As to the conveyance or release of a married woman's rent-charge, or personal annuity for her own or another's life, *vide ante*, Vol. II. 328, (*a*). But by 29 Geo. II. c. 31, a married woman entitled to, or interested in any lease for lives, or any person on her behalf, may, by the direction of a court of equity, surrender such lease for the purpose of renewal, by deed only, without levying any fine.

(*b*) If there be only one vendor, say, "to him the said [*vendor*], by the said [*purchaser*], at, &c. the receipt whereof is hereby acknowledged, HE the said [*vendor*] *hath* bargained and sold," &c.

ONE VENDOR.

TO PRECEDE RELEASE OF ESTATE FOR LIVES OR LIFE.

part and parcel of the same, with their and every of their appurtenances.] To HAVE AND TO HOLD the said messuage or tenement, lands, (and premises, [*or* and all and singular other the premises]) hereby bargained and sold, or intended to be [and every part and parcel thereof,] with their [and every of their] appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, from the day next before the day of the date of these presents, for the term or time of one whole year thence next ensuing and fully to be complete and ended, if (*c*) [*nominees*] of (any or) either of them should so long live, &c. YIELDING AND PAYING therefore [unto the said (*d*) [*vendor*], and [*vendor*] and [ ] his wife, their heirs or assigns,] the rent of one peppercorn on the last day of the said term, [if the same rent should be lawfully demanded]. *To the intent* and purpose, that by virtue of these presents, and by force of the statute made for transferring uses into possession, the said [*purchaser*] may be in the actual possession of all and singular the messuage or tenement, lands, and premises hereby bargained and sold, or intended so to be, with the appurtenances; and be thereby enabled to accept and take a grant and release of the reversion and freehold of the same premises, to (*e*) him, his heirs and

Habendum for one year, if nominees should so long live.

Reddendum.

To the intent that purchaser may be enabled to take a grant and release of the reversion and freehold, for the lives of nominees.

FOR VENDOR'S LIFE.

(*c*) If for the life of the vendor, say, 164.

" if the said [*vendor*] should so long live."

(*d*) If rent be reserved, it should be to the bargainors of the legal estate; but it is usual to make the reservation generally, without saying to whom. *Vide ante*, 164.

TO TRUSTEES OF A SETTLEMENT.

(*e*) If the conveyance be to the trustees of a settlement, say,

" to them the said [*trustees*], and their heirs, for and during the natural lives of the said [*nominees*], and the (survivors and) survivor of them, *To such uses*, upon such trusts, and for such ends, intents, and purposes, and with, under, and subject to such powers, provisoes, declarations, and agreements, as shall be mentioned in or by an indenture of release already prepared and intended," &c. *ut supra*.

assigns, for and during the natural (*f*) lives of the said [*nominees*], and the (survivors and) survivor of them, [*To the use* of the said [*purchaser*], his heirs and assigns, for and during the natural (*f*) lives of the said [*nominees*], and the (survivors and) survivor of them], in such manner and form as shall be expressed in and by an indenture of release, already prepared, and intended to bear date on the day next after the day of the date, and to be executed after the execution of these presents, and to be made between the said [*vendor*], and [*vendor*] and [ ] his wife, of the one part, and the said [*purchaser*] of the other part. IN WITNESS, &c.

TO PRECEDE RELEASE OF ESTATE FOR LIVES OR LIFE.

Reference to release.

(*f*) If for the life of the vendor, say, "life of the said [*vendor*],"

FOR VENDOR'S LIFE.

DEMISE *for a Year at Common Law, by a* CORPORATION, *to be perfected by the Lessee's Entry previous to the Release; with an* ATTESTATION *and* MEMORANDUM OF ENTRY (*a*).

DEMISE AT COMMON LAW BY A CORPORATION.

THIS INDENTURE made the (*b*) day of , in the year George the Fourth, &c. and in the year of our

(*a*) See the reasons why this mode of conveyance is adopted, *ante*, 159; and see the next note, *ad ultimo*.

(*b*) The lease for a year from a corporation, generally bears date several days before the release. When the lands are at a distance from the corporation, this must necessarily be the case. But where the locality of the premises will admit of it, there appears to be no objection to date the lease the day preceding its execution, and for the lessee afterwards to enter, and then to return to the common council of the corporation, and for them to execute the release, at the same com-

The date of a lease for a year from a corporation.

DEMISE AT COMMON LAW BY A CORPORATION.

Lord 18 , BETWEEN the mayor (*c*) and commonalty of the town, (borough, (city, (*or* town and county,) of , of the one part; and [*purchaser*] of, &c. of the other part; WITNESSETH, that for and in consideration of the sum of five shillings of lawful money of Great Britain [and Ireland], to them the said mayor and commonalty paid by the said [*purchaser*], at or before the sealing or delivery of these presents; the receipt whereof is hereby acknowledged; *They* the said mayor and commonalty *have* granted and demised: *And* by these presents *do* grant and demise unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT messuage or tenement, &c. *(with general words, and clause of the reversion,* ut ante, 170, *or* 173.) TO HAVE AND TO HOLD the said messuage or tenement and premises hereby granted or demised, or intended so to be, with their appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, from the day next before the day of the date of these presents, for the term of one whole year from thence next ensuing, and fully to be complete and ended. YIELDING AND PAYING therefore to the said mayor and commonalty, or their successors, the rent or sum of one shilling of lawful money of Great Britain [and Ireland]. *To the intent* and purpose that the said [*purchaser*] may enter into and upon, and take possession of the said messuage or tenement, and premises hereby demised, and be thereby enabled to take and accept a grant and release of the reversion and inheritance thereof to be

Parties.

Testatum.

Grant and demise.

Parcels.

Habendum.

Reddendum.

To the intent that lessee may enter, and be thereby enabled to take a release of the reversion and inheritance.

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mon council as they executed the lease. Indeed there is no objection to the lease being dated on the same day as the release, provided the lease be executed first, and the lessee enter before the execution of the release.

To avoid trouble and doubts on this point, a corporation should convey by feoffment. See the form, *infra*, FEOFFMENT, title PURCHASE.

BAILIFFS, &c.

(*c*) If it be the case, say, "the mayor, bailiffs, burgesses, and commonalty," *or* "the mayor, aldermen, and burgesses of," &c. *ut supra*, and repeat these words all through, *ut ante*, Vol. I. 267.

made to him and his heirs (*d*) by the said mayor and commonalty, by an indenture already prepared, and intended to bear date the day of this instant month of , and to be made between the said mayor and commonalty of the first part, and the said [*purchaser*], of the second part. IN WITNESS whereof the said mayor and commonalty have hereunto set their common seal, the day and year first above written.

DEMISE AT COMMON LAW BY A CORPORATION.

Testimonium.

THE common seal (*e*) of the within-named mayor and commonalty was, at a common council, held on the day of the date of the within-written indenture, affixed thereto, by the said mayor, in the presence of us, [L. S.]

Attestation.

MEMORANDUM OF ENTRY, *to be endorsed on the Lease for a Year.*

MEMORANDUM OF ENTRY.

BE IT REMEMBERED, that on this day of , in the year of our Lord 18 , the within-named [*purchaser*] did, under and by virtue of the within

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(*d*) The release may be to uses, to prevent dower, &c. as the uses will arise out of the seisin of the releasee. *Vide ante*, 160. If the release be to uses, see the forms, *ante*, 167, 171.

RELEASE TO USES.

(*e*) Grants by corporations must be by deed under their common seal; Com. Dig. *Franchise*, (F. 13.); and such deed, so sealed, is good without delivery. *Willis* v. *Jermine*, 2 Leon. 97. Cro. Eliz. 167, S. C. Davy's Rep. 44. b. Watk. Conv. *Corporation*. Harg. n. Co. Litt. 36, a. (5). 6 Vin. Abr. 267, (G. 2); *ibid.* 292, (K. 2.) 1 Kyd on Corporations, 263, 268.

Grant by corporation by deed, without delivery, is good.

A dean without the chapter, a mayor without his commonalty, the master of a college or hospital without his fellows, cannot purchase or grant, or make any contract that will bind the corporation. 2 Bac. Abr. 10, Gwill. ed. *Corporations* (E), 1. So, *e converso*, a bond or contract entered into by the body, in the absence or imprisonment of the head, will not bind. 21 Edw. IV. 12. *Anon.* 12 Mod. 232. *Rex* v. *Carter*, Cowp. 222, 226. Where no provision is made by the con-

The head cannot grant without some of the body; nor the body without the head.

MEMORANDUM OF ENTRY.

written indenture, enter into and upon, and take possession of the messuage or tenement, and premises thereby demised to him the said [*purchaser*]; (*f*) *And* did thereupon pay to the within-named mayor and commonalty the sum of one penny, in part of the sum of one shilling, reserved by the within-written indenture; *In* the presence of us,

[*Purchaser*, or *Releasee.*] [A. B.], of, &c.
[C. D.], of, &c.

The acts of a majority present at a meeting, duly summoned, generally bind the whole.

stitution of a corporation, the whole are bound by the acts, not only of the major part, but of the major part of those who are present at a regular corporate meeting, whether the number present be a majority of the whole body, or not. *The Queen* v. *Sutton*, 10 Mod. 76. *Attorney-General* v. *Davy*, 2 Atk. *Rex* v. *Varlo*, Cowp. 250. Com. Dig. *Franchise*, F. (11). So, though a particular constitution requires the *presence* of a majority of the *whole* number, yet the *concurrence* and *consent* of a majority of the whole is not necessary: it is sufficient that a majority of the number *present* concur. *Cotton* v. *Davies*, 1 Str. 53. *Oldknow* v. *Wainwright*, 2 Burr. 1019. So, where a number less than the majority of the whole, are, by a particular constitution, competent to do a corporate act, the act of a majority of that smaller number is equivalent to the act of a majority of the whole. 2 Gwill. Bac. Abr. 16.

The seal of a corporation should be proved by a witness acquainted with the impression.

The seal of a corporate body ought to be proved by a witness acquainted with the impression. *Moises* v. *Thornton*, 8 Durnf. and East, 307. It is not, however, necessary to prove the seal of a corporation in the same manner as the seal of an individual, that is, by producing a witness, who saw the seal affixed to the identical instrument; but when an instrument purports to be under the seal of a corporation, it will be sufficient to shew that the seal is the official seal of the corporate body. 8 Durnf. and East, 307. In *Woodnass* v. *Mason*, 1 Esp. N. P. C. 53, it was held by Lord Kenyon, that the seal of the city of London proves itself. 1 Phillipps on Evidence, 387, 4th ed. [366, 6th ed.] Nor is it necessary that the party producing the deed of a corporation should prove, by a witness, the fact of the seal having been regularly affixed, or that a requisite majority of the corporation agreed; but if it be alleged to have been affixed by the hand of a stranger, that must be proved by the party who alleges it. See Skin. 2. 1 Kyd on Corporations, 268. However, on a grant by a corporate body, it is usual to have an attestation.

As to attestation generally, *vide ante*, Vol. II. 651, (*a*).

(*f*) This payment does not appear to be requisite.

BARGAIN AND SALE IN FEE, &c.

BARGAIN AND SALE IN FEE, &c.

For Bargain and Sale in Fee, &c. see titles Purchase and Recovery; and Index to the Precedents, title Bargain and Sale.

BILL OF SALE.

BILL OF SALE.

For Bill of Sale, see titles, Mortgage, and Purchase; and Index to the Precedents, title Bill of Sale.

BOND.

BOND *for Payment of* MONEY *and* INTEREST, *either in one Sum or by Instalments, and either with one, two, three, or more Obligors, or one, two, three, or more Obligees.*

PAYMENT OF MONEY AND INTEREST.

KNOW ALL MEN BY THESE PRESENTS, *That* I (*a*) [*obligor*], of in the county of [*yeoman*], am held and firmly bound to (*b*) [*obligee*], of , in the county of , [*esquire*], in the sum of [*double the amount of the principal sum to be secured*, vide post, 199, (*a*)] pounds of lawful money of Great

Common obligation from one to one.

(*a*) If there be two or more obligors, say, "We [*obligor*] of, &c., [*other obligor*] of, &c., (*or* [*surety*] of, &c.), are held," &c. *ut supra.*

TWO OR MORE OBLIGORS.

(*b*) If there be two or more obligees, say, "[*obligee*] of, &c., and [*obligee*] of," &c.

TWO OR MORE OBLIGEES.

PAYMENT OF MONEY AND INTEREST.

Britain [and Ireland] ; to be paid to the said (*c*) [*obligee*], or to his certain attorney, executors, adminis-

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TWO OR MORE OBLIGEES.

(*c*) "[*obligee*], and [*obligee*], or to their certain attorney, executors, administrators, or assigns ; *For*," &c., *ut supra.*

Some gentlemen say,

"[*obligees*], or to one of them, or to their or his certain attorney, executors," &c., *ut supra.*

One of divers obligees may release the obligor.

But the first form seems to be the most correct, upon principle. For although there are divers obligees, yet if one releases to the obligor, it bars all. 2 Roll. Abr. 410, (D.) pl. 1. So if there are two conusees of a statute, and one of them releases to the conusor, the release extinguishes all the statute against the other also. *Ibid.* 411, pl. 5. So if two executors sell the goods of the testator for a certain sum of money, and take an obligation for the money, the release of one of them shall bar both. *Ibid.* pl. 6. 18 Vin. Abr. 348. 5 Bac. Abr. 702, Gwill. ed. *Release*, (G). Therefore there is not any necessity for saying that the payment may be made "to one of them." If by the words "to one of them, or his certain attorney," &c. it is meant that the payment may be made to the survivor or his executors, &c. the expression is useless, because the remedy necessarily survives. It cannot be supposed that by those words, and the words in the condition, noticed, *post*, 196, the intention is, that payment may be made to the executors of a deceased obligee in the life-time of the other joint obligees.

If a bond be made to three, two cannot bring an action, unless the third is dead.

But, nevertheless, if an obligation be made to three, and two bring their action, they ought to shew that the third is dead. Sid. 238, 240. 5 Bac. Abr. 163, Gwill. ed. *Obligations*, (D.) 3. So if an obligation be made to three to pay money to one of them, they must all join in the suit, for they are but as one obligee ; and if he to whom the money is to be paid, dies, the others must sue, although they have no interest in the sum contained in the condition, *Rolls* v. *Yate*, Yelv. 177. But it seems otherwise where the obligation is several. For it is said, if A. be bound to B. and C., paying one moiety to B. and the other to C., this is a several obligation, and the release of one shall not prejudice the other ; nor can one of them bar the other of his action ; *per* Justice Browne, Moor, 641. For the whole Court held, that if the words "equally to be divided," be in the obligation, it is not a joint debt, but divided debts. *Shaw* v. *Sherwood*, Cro. Eliz. 729 ; and Glanvill said, that there may be several obligations to several men

But it seems, if the obligation be several, one obligee cannot prejudice the other; but each may maintain an action for the several debt.

trators, or assigns: *For* which payment to be well and truly made, I (*d*) bind myself, my heirs, exe- PAYMENT OF MONEY AND INTEREST.

of several sums, in one deed. Dyer, 350. a. (20) *in marg.* The case of *Shaw* v. *Sherwood,* was afterwards affirmed on a writ of error. *Whorewood* v. *Shaw,* Yelv. 25. However, where a bond of 200*l.* was made to two, to pay them, *scilicet,* one hundred pounds to one of them, and the other hundred to the other: one of the obligees died, and his executor sued for the one hundred pounds; and in the 18 Eliz. it was made a *quære,* whether the entire 200*l.* should not accrue to the survivor? But in the 21 and 22 Eliz. it was resolved by the Court that the 200*l.* survived, and that the words "*scilicet* one hundred pounds to one, the other hundred to the other," were void words. Dyer, 350. a. (20), *& in marg. ad ult.* Lord Hobart also thought that the *scilicet* severing the money between them, made that *solvendum* void. See *Stukely* v. *Butler,* Hob. 172. Hargr. n. Co. Litt. 180. b. (1). The principle of the above cited case of *Shaw* v. *Sherwood,* seems to be the better opinion, because it accomplishes the expressed intention of the parties. [Where several parties were bound severally in distinct penalties, and then three others "in 1000*l.* each," the word *each* made it a several, and not a joint and several bond, and the cancelling the bond as to one of them did not avoid it as to the rest, although they might have a remedy by contribution. *Collins* v. *Prosser,* 1 B. & C. 682: see *Hawkshaw* v. *Parkins,* 2 Swanst. 539, and *post,* 182. *Ed.*]

(*d*) If there be two obligors only, say,

"We bind oursèlves and each of us, our and each of our heirs*, executors, and administrators, and every of them jointly and severally, firmly," &c. *ut supra.* TWO OBLIGORS.

If there be three obligors only, say,

"We bind ourselves, and each of us, and any two of us, our and each of our and any two of our heirs, executors, and administrators, jointly, severally, and respectively, firmly," &c. *ut supra.* THREE OBLIGORS.

* The heirs must be expressly named in a writing under hand and seal, otherwise they are not chargeable. *Barber* v. *Vox,* 2 Saund. 136. *Gifford* v. *Manley,* Cas. temp. Talb. 109; 3 Bac. Abr. 458, Gwill. ed. *Heir,* &c. (F). [Except in covenants which run with the land. *Lougher* v. *Williams,* 2 Lev. 92.] But the executors and administrators are bound by every bond or covenant, without being named. Dyer, 14, pl. 69. Wms. n. 2 Saund. 137. a. For any word which will prove a man a debtor, or to have money, if it be by writing, will charge the executor or administrator. Noy's Max. 105. Heirs are not bound, unless named; but executors and administrators are.

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cutors, and administrators, and every of them, firmly

THREE OR MORE OBLIGORS.

If there be more than three obligors, say, varying it as the circumstances of the case require,

"We bind ourselves, and each of us, and any four, three, or two of us, our and each of our, and any four, three, or two of our heirs, executors, and administrators, jointly, severally, and respectively, firmly," &c. *ut supra.*

Or the full form, *ut ante*, Vol. II. 608, may be used: but both forms have the same effect.

On a joint and several bond, the obligee may sue all jointly, or any one separately; but on a joint bond, he must sue them jointly.

Without a joint severance of the obligation, two or more obligors cannot be jointly sued in the life of another joint, or joint and several obligor, if they plead in abatement, that there is another joint obligor.

It is the same as to joint, or joint and several covenantors.

If two or more bind themselves in an obligation jointly and severally, the obligee may sue them all jointly, or he may sue any one of them, at his election; but if they are jointly, and not severally bound, the obligee must sue them jointly. However, if three or more bind themselves jointly and severally, the obligee cannot sue two of them only, jointly; unless it appear to the court that the other obligors are dead. But if two be bound in a bond jointly, and one be sued alone, though he may plead this matter in abatement of the writ, yet he cannot plead *non est factum;* for it is his deed, though it be not his sole deed. Co. Litt. 283. a. *Vide ante*, Vol. I. 502. And as to a joint covenant, *vide ante*, Vol. I. 312. It is for the purpose of enabling the obligee, or covenantee, to sue two or more of the obligors or covenantors alone, without joining the others, that the usual severance in an obligation, and in the lien part of a covenant, is made, *ut ante*, Vol. I. 502, Vol. II. 608, as to a bond; *ante*, Vol. I. 634, as to a covenant. [It seems that a covenant not to sue the principal would be a release in equity to the surety. *Hawkshaw* v. *Parkins*, 2 Swanst. 539. See *ante*, 181. *Ed.*]

On a joint bond, the representatives of a deceased obligor are discharged at law;

but it is otherwise if it be joint and several.

If the bond be joint, and one of the obligors dies, his representatives are totally discharged at law, and the survivor or survivors only are chargeable. But it is otherwise if the obligors were bound jointly and severally. *Towers* v. *Moore*, 2 Vern. 99. 5 Bac. Abr. 164, Gwill. ed. *Obligations*, (D). 4.

In equity it was formerly held, that the representatives of a deceased joint obligor were liable;

but the present doctrine in

In equity it was formerly held, that the representatives of a deceased joint obligor were liable: for in *Primrose* v. *Bromley*, 1 Atk. 90, Lord Hardwicke said, "there was a case which I determined in this Court, where there were two persons *jointly* bound in a bond; one of the obligors died; and to be sure, at law, it might have been put in suit against the survivor; but as I thought it extremely hard, I decreed the representatives of the co-obligor should be charged, *pari passu*, with the surviving obligor in the payment of the bond." And see *Church* v. *Bishop*, 2 Ves. 373. But the present doctrine in equity ap-

by these presents; *Sealed* with my seal: DATED

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pears to be otherwise; qualified, however, by the exception of joint bonds by copartners, for partnership debts, which have been held to be several.

equity appears to be otherwise in all cases excepting joint bonds for partnership debts, which have been held to be several.

Some of the cases in relation to joint bonds by copartners, were decided on the ground that the bonds were filled up by the parties themselves; that they were ignorant of the distinction between a joint bond, and a joint and several bond; and that it was the intention of the parties, that the obligors should be severally, as well as jointly bound: therefore the obligees were admitted creditors on the separate estates of the obligors. Ex parte *Symonds*, 1 Cox, 200. In the bankruptcy of *Bates* and *Henckell*, cited 3 Ves. 400; and in the bankruptcy of *Freeman* and *Grace*, Ibid. 401; *Daniel* v. *Cross*, Ibid. 279; and in *Thomas* v. *Fraser*, 3 Ves. 399, it was admitted to have been the intention, that the bond should be in the common and usual form of bonds from two persons; the same, in effect, as the admission in the other cases. But the Court particularly noticed the additional circumstance, that there had been a previous promissory note for part of the debt; and observed, that the bond was no better security than a note, unless it was a joint and several bond. For a partnership note from persons in trade, would have all the effect that a joint bond would have. And therefore, in that case, one of the obligors being bankrupt, the personal and real assets of the other of them, who was dead, were held liable to the payment of the principal and interest. *Gray* v. *Chiswell*, 9 Ves. 125. So in *Burn* v. *Burn*, 3 Ves. 574, the evidence was very full as to the intention, that each partner should be severally bound; and that the bond was filled up as a joint bond through mistake, and the ignorance of the parties: it was therefore held, that the bond should be several, against creditors, in the administration of assets. In this case the obligors were described as "Mayne and Co.," without naming the different partners; and the bond was executed by Mayne only, because his name stood first in the firm; but as he executed the bond with the privity of the other partners, who were present at the execution, it was held, that they were all bound by it. 3 Ves. 573. 575. 578. *Ball* v. *Dunsterville*, 4 Durnf. & East, 313. Thus it appears that the cases of relief on joint bonds may be accounted for on the ground of mistake in the manner of framing the instrument; and it may be said that equity gives to them no other effect than it was the intention of the parties themselves to have given to them. *Underhill* v. *Horwood*, 10 Ves. 227, 228.

1st, where the bonds were made joint only by mistake;

However, it may be proper to observe further, that the common

2nd, In equity partners and

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this day of , [in the year of the reign

their representatives have been held severally liable, though the bond or note for partnership debt was joint.

law, though it professes to adopt the *Lex Mercatoria*, nevertheless, it has not adopted it throughout, in what relates to partnership in trade. It holds, indeed, that although partners are in the nature of joint tenants, there shall be no survivorship between them in point of interest; yet, with regard to partnership contracts, it applies its own peculiar rule; and because they are in form joint, holds them to produce only a joint obligation, which consequently attaches exclusively upon the survivors: whereas, it is apprehended, by the general mercantile law a partnership contract is several as well as joint. That may probably be the reason why courts of equity have considered joint contracts of this sort, (that is joint in form), as standing on a different footing from others. *Devaynes* v. *Noble*, 1 Meriv. 564. Thus in the case of *Lane* v. *Williams*, 2 Vern. 277. 292, the ground of the decree was, not that the partnership had given a note, but that the note was given for a partnership debt. It was, not that the note was, either in its form, or in the intention of the parties, to be considered as the separate note of each; and, least of all, as the separate note of Williams, who knew nothing of the occasion of giving it: but the declaration in the decree, (as taken by Mr. Raithby from the Register's book) was, "that Richard Newberry, and the defendant Williams's intestate, being partners at the time of borrowing the money and giving the note in question, and the said money being lent on the credit of such partnership, that either of the said partners was liable to pay the same." Then it adds, "and the rather, for that the defendant Williams took such bond from Newberry as aforesaid." That circumstance is stated as corroborating the equity in the particular case, but not as the ground of it, because it is explicitly declared, that *quâ* partners, they were, each of them, liable for the partnership debt. In *Bishop* v. *Church*, 3 Atk. 691, 2 Ves. 100, 371, though Lord Hardwicke doubted a little, at first, whether it sufficiently appeared that the bond was intended to be separate as well as joint; yet, when it was ascertained that the money had been borrowed in the course of the partnership dealing, he thought the equity was perfectly clear. So in *Jacomb* v. *Harwood*, 2 Ves. 267, it is evident that Sir John Strange was of opinion, that the estates of both partners were liable to the payment of the note, though it was not necessary to resort to that equity in the particular case, inasmuch as the surviving partner, being the executor of the deceased partner, had executed a mortgage to secure the debt, which it was held to be within his competency to do. In *Daniel* v. *Cross*, 3 Ves. 277, no doubt whatever ap-

of our Sovereign Lord *George* the *Fourth*, by the

pears to have been suggested with regard to this equity. The only question was, whether it had been waived by the subsequent dealings with the new house. It is true, in Ex parte *Kendall*, 17 Ves. 525, in the bankruptcy of the firm of Devaynes and Co. bankers, Lord Eldon expresses his surprise, "that a court of equity should have interposed to enlarge the effect of a legal contract;" but Sir William Grant said, "I do not understand him to have intimated a doubt of the existence of this equity." Indeed his lordship said, in relation to this equitable liability of partners, "the modern doctrine certainly is, that where a man has chosen to take the joint credit of several, though at law his security his wearing out, as each of his debtors dies; yet it is fit that the creditor, whose debt remains at law only against the survivors, should resort to the assets of a deceased debtor; and a court of equity will, under certain modifications, constitute that demand:" 17 Ves. 525: "but it is too much to say, that because there is a doctrine in this court, that the creditors of the five might, under certain circumstances, go in, every such creditor has a right to resort to the separate estate of Devaynes, or that the subsequent dealings of a particular creditor may not have made it inequitable that he should do so." 1 Rose, 75. S. C. And his lordship himself acted on this equity, in *Gray* v. *Chiswell*, 9 Ves. 118; for if the remedy had been extinct in equity, as it was at law, the joint creditors would have had no more right to come on the surplus of the effects, than to share them with the separate creditors; yet, on the surplus they were admitted, and without regard to the manner in which their debts were constituted. And see *Underhill* v. *Harwood*, 10 Ves. 227. In that case of Ex parte *Kendall*, the Lord Chancellor took it to be clear, that the only question which Mr. Devaynes's representatives could make was, whether these creditors had so dealt with the surviving partners, as to make it inequitable in them to resort to his assets? "Then," added the late venerable Master of the Rolls, Sir William Grant, in *Sleech's* case, in *Devaynes* v. *Noble*, 1 Meriv. 566, "what is that sort of dealing by which this effect is to be produced? I apprehend it must be something very different from what has taken place in Miss Sleech's instance.

Equity of a creditor against the estate of a deceased partner, not barred by eight months non-claim, and

"It is contended by the representatives of Mr. Devaynes, that Miss Sleech has lost her remedy against his estate, merely by not having prosecuted her demand in the interval between his death and the bankruptcy of the surviving partners; which is a period of about eight months. All that has passed in her case is, that she has received a

grace of God of the united kingdom of Great Bri-

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payment in part by the surviving partners.

payment of a part of her debt, and that she has taken no step for the recovery of the remainder of it. Now, if the equity stands upon any principle, upon what assignable principle can it be barred by this short arbitrary limitation? Upon what authority can a creditor be told, that the estate of Mr. Devaynes was, at the moment after his death, liable to his demand; but that he has no longer any claim upon that estate, even although in the mean time there should have been no dealing whatever between him and the surviving partners. In the case of *Lane* v. *Williams*, 2 Vern. 277, 292, there was certainly a much greater *laches*, if *laches* it is to be called; and the hardship that is insisted upon in this case was strongly complained of there; of letting in the demand of a creditor upon the separate estate of the deceased partner, after such a length of time: for the defendant, besides insisting that it did not appear that Williams was privy or consenting to the borrowing of this money, or that if was brought into stock, or used in the trade, further insisted, that had the plaintiff demanded it in the lifetime of Newberry, who was the surviving partner, or before his estate was wasted, and his assets exhausted, she, the defendant, might have had recourse to the bond of copartnership, to repair the loss sustained by Newberry's taking up the money, and giving such note without the consent or privity of her husband: but she, (his representative,) had lost her remedy by the plaintiff's *laches* in not demanding the debt sooner, and therefore the plaintiff ought not to have the assistance of a court of equity to charge her. This, however, was urged in vain. The court said, very nearly in the terms I have already stated from the decree, that "the money being paid at the shop, the note of one partner binds both; and, though at law the note stands good only against the executor of the surviving partner, (who was Newberry,) who received the money, and signed the note, yet it was proper in equity to follow the estate of Williams for satisfaction." In the case of *Daniel* v. *Cross*, 3 Ves. jun. 277, the partnership had been dissolved in the month of March, 1791. The testator died in June, 1791. Advertisements had been published for all the creditors to come in and claim their debts upon his estate. The bankruptcy of the new house did not happen till the month of March, 1793; and yet it was hardly contended, that the lapse of time, from June 1791, to March 1793, was sufficient to exclude the claim upon the estate of the predeceased partner. The argument turned entirely upon the effect of the subse-

tain and Ireland King, Defender of the Faith; and] in the year of our Lord one thousand eight hundred and .

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quent dealings. I take it, that it must therefore, upon the authority of these cases, and upon general principles, be held, that in the case of an ordinary partnership, it is impossible to say that Miss Sleech has been guilty of such laches as to preclude her from such remedy as she originally had against Mr. Devaynes's estate.

No difference in principle between the case of a banking house and any other partnership, as to the equity of the creditor against the deceased partner's estate.

Money paid into a banker's constitutes a debt, not a deposit.

Creditors leaving money in the hands of the surviving partners in a bank, does not constitute a new contract, nor operate as a relinquishment of the old security.

" But it is supposed that there is a considerable difference between the case of bankers and that of any other partnership: and that it is impossible for the creditors of a banking shop to permit their money to remain in the hands of the surviving partners for such a space of time as eight months, (indeed the argument went to eight days, or even to a shorter period,) without recognizing those surviving partners to be the depositaries of the balance due, and therefore exclusively responsible to make what is called the deposit forthcoming. There is a fallacy in likening the dealings of a banker to the case of a deposit, to which, in legal effect, they have no sort of resemblance. Money paid into a banker's becomes immediately a part of his general assets; and he is merely a debtor for the amount. Therefore, when a man lodges money with a partnership of bankers, he is as much concerned to look to the solvency of each particular partner, as if he was lending money to any other partnership. The money, in each case, equally ceases to be his, the moment he has parted with it, and he has only to trust, for the return of it, to the solvency of the persons into whose hands it passes; but he has, in each case alike, the credit and the responsibility of all the partners in the firm. Then, when one partner dies, what is to be inferred from the mere circumstance of allowing the debt upon the banking account to remain uncalled for in the hands of the surviving partners, beyond what would be inferred from not immediately calling in any debt due by the surviving partners in any other trade, where money had been advanced or lent to that partnership? The security is permitted to stand just as it did, the party doing nothing to alter it. There is no *novatio debiti*—no new contract—no relinquishment of the old security, whatever it may, either in law or equity, be defined to be.

No rule of convenience, fixing any period within which a creditor of a

" Then, it is supposed that there is a rule of convenience which requires that the creditors of a banking house shall make their demand for their balances upon the surviving partners within some very short period of time, or else be held to have waived their recourse against the

banking house not making his demand on the surviving partners, is held to have waived his equity against the estate of the deceased partner.

estate of the deceased partner. Now I doubt whether the estate of a deceased partner would, upon the whole, be much benefitted by the establishment of such a rule. For, if creditors were told that the only way in which they could preserve their recourse against the estate of a deceased partner, is by using all possible diligence to compel an immediate payment by the surviving partners of the whole of their balances; there are very few houses which could stand such a sudden and concurrent demand as that would necessarily bring upon them. A house might be reduced to a state of bankruptcy, which, in the ordinary course of business, would have been able to fulfil all its engagements; and a demand would be brought on the estate of a deceased partner, from which it might otherwise have wholly escaped; and, therefore, if expediency were to be taken into the consideration, I do not see what purpose of general convenience would be answered by compelling creditors to such a rigorous course, as the condition upon which alone the hold which equity gives them on the estate of a deceased partner could be retained.

Notice of the death of the deceased partner, whether before or after the creditor has received payment in part from the surviving partners, not material.

"Then comes the question, whether, if Miss Sleech has not by her *non feazance* lost her remedy against this estate, she has lost it by any thing she has actually done. The first consideration is, whether the circumstance of her having called for, and received a part of her balance, makes any difference. Whether it was called for before or after she knew of Mr. Devaynes's death is not, in my view of the case, at all material to the question. *Ex hypothese*, the surviving partners are liable to the payment of this debt, and ought, in the first instance, to be called upon for the payment of it. How is it, then, that a creditor, by acting upon that acknowledged liability, to the extent that his convenience and occasions may happen to require, is *quoad* the residue of his debt, to be placed in a worse situation than he would have been *quoad* the whole, if he had demanded no part of it? Miss Sleech by drawing a draft upon the surviving partners, recognizes them as her debtors. Such undoubtedly they were; but how does that affirmative act prove negatively, that thenceforth no other persons were to be her debtors?

Creditor, by drawing on the surviving partners, recognizes them as his debtors, but not exclusively.

"Another act, which is imputed to Miss Sleech as one which releases the testator's estate, is, that she has signed the bankrupt's certificate. Now, I apprehend that that can amount to no release of the demand upon Mr. Devaynes's estate. Supposing the 10th of Anne, c. 15. s. 3. had never passed, I do not conceive that the signing of a bankrupt's certificate could have operated as an ordinary release with regard to any third person; for it is the act of parliament that gives that release, in consequence of the certified conformity of the bankrupt to the re-

Creditor signing certificate of surviving partners, does not thereby release the estate of a deceased partner. The statute gives the release, in conse-

quisitions of the bankrupt laws. A man, by signing a certificate, does not release his own debt, unless the requisite number of creditors afterwards sign; and, if they do sign, the debts of those who do not sign, are as much released as the debts of those who do sign. If it were necessary to resort to the act, it appears to comprehend this case, as it extends to every case of joint contract, or joint obligation of any sort. Therefore, it appears to me, that Miss Sleech has not, in any way, released the demand which it is assumed by the decree, and clearly established by the authorities, that she had at the time of the death of Mr. Devaynes. I am consequently of opinion, that the report of the Master is right, and that the exception must be overruled."

quence of the certified conformity of the bankrupt.

But in *Sumner* v. *Powell*, 2 Meriv. 30, where bankers carrying on business in partnership, received a power of attorney from the trustees in a marriage settlement to receive dividends on stock, including an authority to transfer; and under this authority, one of the partners (Powell the elder) alone, in 1792, sold the stock, and applied the produce to the purposes of the partnership, without the knowledge either of the trustees or of his partners. In 1797, Sumner, one of the partners, died, having appointed the plaintiff his sole executor. In 1801, by an indenture between the plaintiff, of the one part, and the surviving partners, Samuel Castell, Walter Powell the elder, Walter Powell the younger, and William Wilson, of the other part, the four surviving partners jointly covenanted with the plaintiff to indemnify him and his testator's estate from all the debts and engagements of the late copartnership, and from all payments in respect thereof. In 1802, Walter Powell the elder died. In 1803, Wilson quitted the partnership. In 1804, Castell, and Walter Powell the younger, (the two continuing partners,) became bankrupt. In 1805, Wilson died. In 1806, a bill was filed by the parties interested under the marriage settlement, against the surviving trustee of that settlement, and against the bankrupts and their assignees, and against the representatives of all the deceased partners, to have the stock replaced, or for an account of the produce thereof, with interest from the time of the transfer. In 1809, an order was made in that cause, by which it was declared that the present plaintiff, one of the defendants thereto, admitting assets of his testator, and the other defendants, the representatives of Powell the elder, and Wilson, were liable, out of the assets of their respective testators, to pay what should be found due, for principal and interest, on taking the account thereby directed; and it was ordered that they should pay the same accordingly. The bill brought by the present plaintiff, after stating, (among other things)

Joint covenant of indemnity by partners, not extended in equity beyond its legal operation, there being no ground on which to infer mistake in the nature of the instrument, and no previous equity entitling the covenantee to a a several indemnity from each of the covenantors.

that Castell had since died an uncertificated bankrupt, and that Walter Powell the younger, having obtained his certificate, had become bankrupt a second time, but no assignment of his estate and effects had yet been executed; insisted that, by virtue of the deed of indemnity, he was entitled to be repaid out of the estates of the two Powells and Wilson, all such sums as he had already paid, or should pay, under the said decree; therefore praying accordingly. The question was as to the liability of Wilson's estate under the covenant in the deed of indemnity; and this depended on the effect of that deed, as constituting an obligation which, though only joint at law, would, as it was argued, be held in equity to be several as well as joint, and therefore binding on the estate of the deceased covenantor. Sir Wm. Grant, in delivering his judgment, said, "the question is, whether any other effect can be given to this covenant in equity, than it has at law. It has never been determined that every joint covenant is in equity to be considered as the several covenant of each of the covenantors. In the late case of *Devaynes* v. *Noble*, 1 Meriv. 563, I had occasion to examine the authorities on this subject; and found no such general proposition any where laid down. When the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived. A partnership debt has been treated in equity as the several debt of each partner, though at law it is only the joint debt of all. But, there, all have had a benefit from the money advanced, or the credit given; and the obligation to pay exists independently of any instrument by which the debt may have been secured. So, where a joint bond has in equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It was not the bond that first created the liability to pay. But in this case the covenant is purely matter of arbitrary convention, growing out of no antecedent liability in all or any of the covenantors to do what they have thereby undertaken.

Not a principle of equity, that every joint covenant shall be considered as if it were joint and several.

When the obligation exists only by virtue of the covenant, its extent is to be measured by the words of the covenant.

Different, where the obligation is independent of the particular contract, as in the cases of partnership debts, bonds, &c.

"Instead of winding up the partnership concern, and dividing what might remain, after satisfying all claims upon it, the parties make an arrangement by which Mr. Sumner was immediately to receive what was estimated to be his testator's share of the joint estate, he releasing to the other partners all interest in the residue. Why was Mr. Sumner's share of the partnership estate to remain unaffected by any claims by which that estate might afterwards be diminished? There was no equity that entitled him to demand from the other partners an engagement to that effect. But they are contented to give him a covenant of indemnity. As it is only a joint covenant that is given, how can I say

that it is any thing more than a joint covenant that was meant to be given?

"It is not attempted to be shewn, that there was any mistake in drawing the deed, or that there was any agreement for a covenant of a different sort. There is nothing but the covenant itself, by which its intended extent can be ascertained.

"There is no ground, therefore, on which a court of equity can give it any other than its legal operation and effect.—Bill dismissed without costs." [And see *Gough* v. *Davies*, 4 Pri. 200.]

Where such intention appears on the face of the bond, it will be treated as a joint and several bond, although it be only a joint bond in form.

Where a bond was in form only a joint bond, but it was suggested to have been the intention of the parties to make it joint and several, the court referred it to the master, to enquire whether this was the intention of the parties.

Mistake by making a bond joint only, instead of joint and several, rectified in equity by decreeing a new bond, and in bankruptcy by ordering proof accordingly.

If a joint and several bond be not executed by one of the intended obligors, it is only the separate bond of those who execute.

Where a man

Wherever there are circumstances appearing *on the face of the bond*, to shew that it was intended to be joint and several, though in point of form it be only a joint bond, there is no difference between a court of law and a court of equity; the former would consider it as a joint and several bond, as readily as the latter. But upon the head of mistake, a court of equity would go further than a court of law; and if an instrument was really intended to be different from what it appears to be, it is a very proper subject for the interference of the court. Therefore, where the obligee made an affidavit that the bond was intended to be joint and several, the Master was directed to inquire whether the parties meant the bond to be so. Ex parte *Symonds*, 1 Cox, 200. Both in causes, and in bankruptcy, where there has been a joint bond, the court has sometimes inferred, from the nature of the condition, and the transaction, that it was made joint by mistake; and has rectified it, by decreeing in a cause, that a new bond should be executed, joint and several: and as the court would so decree in a cause, it has ordered in bankruptcy, that proof should be made accordingly. *Underhill* v. *Horwood*, 10 Ves. 227.

If it be expressed in a bond, that two or more persons are jointly and severally bound, and one of them does not execute the bond, it is not the joint bond of those who executed it, but only the several bond of each. *Underhill* v. *Horwood*, 10 Ves. 212. 216. 225. *Elliot* v. *Davis*, 2 Bos. and Pul. 338. But if there were a severance of the obligation, *ut ante*, Vol. I. 502; Vol. II. 608; it seems that the obligation would be joint and several, as to those who executed. Lord Eldon says, "I had a notion, which, I think, was not correct, that where a man executes a bond, meaning, that it should be the joint bond of himself and another, and not his several bond, it would not be his several bond. But the cases go farther. In such a case, however, unless there is something special, the man who had become so severally bound, has a right to have that bond delivered up; for his intention was, not to become a mere several obligor*, but to be a joint and

* In the report of the above case, *Underhill* v. *Horwood*, 10 Ves.

executes a bond, meaning it to be the joint bond of himself and another, who does not execute, it is the several bond of the former; but he may have it delivered up, being contrary to the intention. In equity, a joint and several, or a joint obligor, has a right of contribution against the other sureties, and of exoneration from the principal. Assignment of bond to a surety who pays it, is of no use: since even the principal may plead payment to action in name of obligee; but action on the case or *assumpsit* lies for surety, unless he has taken counter

several obligor *; and the rights are different both in law and equity. For if he is only a † several obligor *, he has no remedies over against any one: but, if he is a joint and several obligor *, or only a joint obligor *, there is a right of contribution against the other sureties in equity, from the earliest times, and of exoneration from the principal. [See also *Ware* v. *Horwood*, 14 Ves. 34.] At law the contract is perfectly different. The objection of the obligee, that a court of equity should not interfere, must depend upon very special circumstances. There might be such a case: if for a great length of time acts had been done, amounting to a waiver of the objection." Per Lord Eldon, *Underhill* v. *Horwood*, 10 Ves. 225.

But although a surety may recover of the principal the sum he is obliged to pay, yet he cannot require an assignment of the bond for that purpose, *Gammon* v. *Stone*, 1 Ves. 339, as it would be of no use to him. For if the co-obligor in the bond paid it off, the principal might take advantage of it, and plead payment in bar of an action instituted by the plaintiff in the name of the obligee, as it must be. *Bishop* v. *Church*, 2 Ves. 372. The bond being given for the payment of one sum of money, when it is once satisfied to the obligee, it is *functus officio*. But if a surety pays money for a principal on a bond, having no counter bond, an action on the case lies for the surety, to recover the money from the principal; *Woffington* v. *Sparks*, 2 Ves. 570; or he may bring an action of *indebitatus assumpsit* against him, under the implied contract. But where the surety will not rely on the promise which the law will raise, but takes a bond as a security, there he has chosen his own remedy, and he cannot resort to an action of

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226, Lord Eldon stiles the person who becomes bound in a bond, to be an "obligee;" but as that is neither the technical nor popular acceptation of the word,—in the above extract the word "obligee" is altered to "obligor," in the five instances marked *. It is also rather remarkable, that Dr. Johnson defines an obligee to be "the person bound by a legal or written contract." But in the late valuable edition of Johnson's Dictionary, Mr. Todd has, with his usual discrimination, corrected the error; and defined an obligee to be, "the person to whom another, called the *obligor*, is bound by a legal or written contract." "The bond had been taken in the *obligee's* own name, and not in the King's." Sanderson, Cases of Consc. p. 85. See also Cowel's Interpreter, *verbo* "Obligor," and 2 Bla. Com. 340. [It may be here observed, that the definitions of legal terms, in Dr. Johnson's Dictionary, are generally incorrect; nor have they always been rectified by Mr. Todd. *Ed.*]

† There is some ambiguity in this sentence. His Lordship's particular position cannot be supported. For as to contribution, there is no difference, either at law, or in equity, whether the sureties are jointly or severally bound. See the next page.

assumpsit. *Toussaint* v. *Martinnant*, 2 Durnf. & East, 104. [In equity, a surety may compel his principal to relieve him from his liability by payment of the debt. *Antrobus* v. *Davidson*, 3 Meriv. 369. And see *post*, 195. *Ed.*]

security, when he must bring his action on such security.

And at law, one of several co-sureties in a bond, may recover against any one of the others, his aliquot proportion of the money paid by him under the bond; regard being had to the number of sureties; and even although the insolvency of the principal, and of the other sureties, be not proved; and this either the co-surety who pays, or his executors or administrators, may do by action of *indebitatus assumpsit*. *Cowell* v. *Edwards*, 2 Bos. & Pul. 268. See also *Deering* v. The Earl of *Winchelsea*, 2 Bos. & Pul. 270. There is, however, an objection to the action at law for a contribution, since there only the aliquot part, with reference to the whole number of co-sureties, can be recovered from each surety: therefore, if any of the sureties are insolvent, the plaintiff is to that extent, deprived of his remedy. But in equity, it seems, that the insolvent co-sureties shall be struck out, and the rest shall contribute equally. *Peter* v. *Rich*, 1 Ch. Rep. 34; also cited *Ibid*, 151. *Hole* v. *Harrison*, 1 Ch. Ca. 246. *Swain* v. *Wall*, 1 Ch. Rep. 149. Ellis on Debtor and Creditor, 311. The doctrine of contribution among sureties is not founded on contract, but both at law and in equity it is founded on general principles of justice, on the ground of equality of burthen and benefit. Therefore it makes no difference whether the sureties are jointly, or jointly and severally bound: nor will it make any difference if they are severally bound, and by *different* instruments, but for the *same* principal, and the *same* engagement: and though one person becomes a surety by a separate instrument, without the knowledge of another surety, it makes no difference. *Craythorne* v. *Swinburne*, 14 Ves. 165, 169. There is, however, this distinction, that where the sureties enter into separate bonds, the penalties of those distinct bonds will ascertain the proportion in which they are to contribute; but if they join in one bond, then they must contribute equally. *Deering* v. Earl of *Winchelsea*, 1 Cox, 323; 2 Bos. & Pul. 270. S. C. *Craythorne* v. *Swinburne*, 14 Ves. 165. In *Mayhew* v. *Crickett*, 1 Wils. Ch. Rep. 424, Lord Eldon says, "the right of contribution between sureties, exists not only in cases where they are sureties by one and the same instrument, but also where they are constituted sureties by different instruments. The case of *Deering* v. the Earl of *Winchelsea*, in which that was first decided, certainly shook the notions which formerly prevailed in Westminster Hall on the subject; and though I, at one period, was dissatisfied with that decision, I am now convinced that it was perfectly right." And see his Lordship's observations on the same case in *Craythorne* v. *Swinburne*, 14 Ves. 165. 169, 170. *Ware* v. *Horwood*, 14 Ves. 31. So if

Co-sureties have remedy against each other at law, for a contribution for the aliquot part of each.

In equity insolvent co-sureties are struck out, and the rest contribute equally.

Sureties are liable to contribution, whether bound jointly, or jointly and severally, or severally by different instruments.

If sureties give separate bonds, they contribute according to the respective penalties; if only one bond, they contribute equally.

If one surety pays more than his proportion, the others must contribute.

A co-surety may, by express contract, limit his liability, or avoid contribution altogether.

one surety pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion which in all events he is to pay. Ex parte *Gifford*, 6 Ves. 808.

However, although the right of contribution among sureties does not spring from contract, yet contract may qualify it, as in *Swain* v. *Wall*, 1 Ch. Rep. 149; where Swain, Wall, and Jorden, 16 Jac., became jointly bound in a bond of 500*l.* to the city of London, for the payment of 312*l.* in February then next; which 300*l.* was employed by one Shadwell for procuring the place of Serjeant at Arms; which place Shadwell afterwards assigned to one Hunt for good consideration; and Hunt, by the direction and agreement of Shadwell, Swain, Wall, and Jorden, entered into several counter-bonds unto Swain, Wall, and Jorden, for their indemnity from the bond of 500*l.* to the city of London. And thereupon it was agreed, that if Hunt failed to pay the debt to the city, then Swain, Wall, and Jorden should pay their *respective parts* of the said debt to the city. Hunt died possessed of the place, insolvent. The city calling in the debt, and Wall not being able to pay his share, Swain and Jorden, in 1662, took up 300*l.* of Ducket and Bates, and were bound unto them in several obligations for re-payment thereof, and therewith paid the debt to the city. Afterwards Jorden became insolvent; and Swain, on behalf of himself and Jorden and Wall, was forced to pay the 300*l.* to Ducket and Bates, and all interest. Wall being afterwards of sufficient estate to pay his rateable part of the 300*l.* and interest, paid by Swain, he filed a bill against Wall, praying that he might be decreed to pay him a *moiety* of the 300*l.* and interest, Jorden being insolvent; but the Court decreed Wall to pay only a *third part* of the 300*l.* and interest; and that if the plaintiff had recovered or received any thing towards the third part of the debt and interest of the counter security before mentioned, he was to allow the same to the defendant. Therefore as a party may by a special contract narrow his liability as co-surety, so he may by a special engagement contract so as not to be liable to contribute in any degree. *Craythorne* v. *Swinburne*, 14 Ves. 165. 170. [And see *Hough* v. *Warr*, 1 Carring. 151.]

A subsequent surety for a principal and surety is not liable to contribution in favour of the first surety.

A distinction is also to be observed upon the liabilities and rights of a co-surety, whether he is strictly so, or whether he is only in the nature of a surety for the principal and the other surety. Thus, if a person give a separate bond as a supplement security for payment of a debt, in default of its being paid by the principal or his surety, under a former bond, he is not liable to contribution in favour of the first surety; such first surety being, as to the second surety, a principal. *Craythorne* v. *Swinburne*, 14 Ves. 160. 171. In *Cooke* v. ———, 2 Freem. 97, S. C. 2 Eq. Ca. Abr. 223, pl. 1, it is said the Master of the Rolls seemed to think that the second surety should be liable for

contribution to the first; but as there is no such judgment in the Register's book, the authority of that case is now overruled. 14 Ves. 167, 171.

In *Dunn* v. *Slee*, 1 Moore, 2, it was held, that a surety in an indemnity bond, may bring an action of *assumpsit* for contribution against his co-surety, although he had given a subsequent security to the obligees, under which he paid the sum conditioned in the bond, without the knowledge or consent of such co-surety.

Creditor giving time to principal, discharges surety.

But it has been held in the House of Lords, that with respect to principal and surety in a bond, if the creditor enters into a binding contract with the principal debtor to give him further time to pay, without the concurrence of the surety, the surety is discharged, because the creditor has put it out of his own power to enforce immediate payment, where the surety would have a right to require him to do so. *Bank of Ireland* v. *Beresford*, 6 Dow. 238. And see *Eyre* v. *Bartrop*, 3 Madd. 221, *ante*, Vol. I. 509. *Mayhew* v. *Crickett*, 2 Swans. 185. 1 Wils. 418. [and 424] S. C. *Samuel* v. *Howarth*, 3 Meriv. 278. [But where no injury will be sustained by the sureties, they are not discharged. *Prendergast* v. *Davey*, 6 Madd. 124. 5 B. & A. 187. S. C. And see *Tyson* v. *Cox*, 1 Turn. and Russell, 395. *Ed.*]

The laches of obligee does not always discharge surety. Dividend received under principal's bankruptcy deducted, as against sureties, from penalty of bond.

However, where a bond was executed by an insurance broker, as the principal obligor, and two sureties; with a condition, that if they should pay the obligees certain premiums which should become due for assurances on ships at sea, as should be made with the obligees by the insurance broker, and that within six months after the making the assurances, the bond was to be void. The broker became bankrupt, and was indebted to the obligees in a considerable sum for premiums; and they received a dividend of six shillings in the pound, under the commission. The premiums were due three years before the bankruptcy, and the obligees did not call on the sureties until after the bankruptcy. Held, first, That the sureties were not discharged by the laches of the obligees in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond: and, secondly, That the dividend received by them under the commission, was to be deducted, as against the sureties, from the penalty contained in the bond. *London Assurance Company* v. *Buckle*, 4 Moore, 153. [And see *Walwyn* v. *St. Quentin*, 1 Bos. & Pull. 652. *Nesbitt* v. *Smith*, 2 Bro. C. C. 179. *Rees* v. *Berrington*, 2 Ves. 540. *Boultbee* v. *Stubbs*, 18 Ves. 20. *Fentum* v. *Pocock*, 5 Taunt. 192. And the same principles as to the discharge of a surety, prevail at law as in equity. *Samuel* v. *Howarth*, *ubi supra*. *Twopenny* v. *Young*, 3 B. & C. 208. A court of equity will not relieve a surety in a bond, upon the ground of the creditor having given time to the principal, unless

Condition of a bond from one to one, for payment of money and interest.

(*e*) THE CONDITION of the above written bond or obligation is such, *That* if the above bounden (*f*) [*obligor*], his heirs, executors, or administrators, should well and truly pay, or cause to be paid unto the said [*obligee*] (*g*), his executors, administrators, or assigns, the full sum of pounds of lawful money of Great Britain [and Ireland], with interest for the same after the rate of five pounds for one hundred pounds for a year (*h*), upon the day of

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there has been an express and positive contract between them for that purpose. *Heath* v. *Key*, 1 Yo. & Jer. 434. And see *Collins* v. *Prosser*, 1 B. & C. 682. *Orme* v. *Young*, 1 Holt. N. P. C. 84. *Philpot* v. *Briant*, 4 Bing. 717. *Ed.*]

SURETY. (*e*) If there be a surety or sureties, it seems prudent to say,

"WHEREAS the above bounden [*surety*] hath (*or* [*sureties*] have) agreed to join with the above bounden [*principal*], in the above written bond or obligation, subject to the condition hereunder written, as a surety (*or* sureties) for the said [*principal*], his heirs, executors, and administrators:

"NOW THEREFORE THE CONDITION," &c. *ut supra.*

TWO TO ONE. (*f*) If there be two obligors, say,

"the above bounden [*obligor*], and [*other obligor*], or either of them, their or either of their heirs," &c. *ut supra.*

THREE, OR MORE, TO ONE. If there be three or more, say,

"the above bounden [*obligors*], or any, or either of them, their, or any or either of their heirs," &c. *ut supra.*

TO TWO, OR MORE. (*g*) If there be two or more obligees, say,

"[*obligees*], their executors, administrators, or assigns, the full sum," &c. *ut supra.*

Some gentlemen say,

"[*obligees*], or any or either of them, their, any, or either of their executors, administrators, or assigns, the full sum," &c.

Sed vide ante, 180, (*c*).

BY INSTALMENTS. (*h*) If to be paid by instalments, say,

"in manner following; that is to say; the sum of

[*generally six months from the date*] now next ensuing, without any deduction or abatement whatsoever, *Then* the above written bond or obligation shall be void, and of no effect, or otherwise shall be and remain in full force and virtue (*i*). PAYMENT OF MONEY AND INTEREST.

Signed. SEALED AND DELIVERED (being first duly stamped,) in the presence of } Attestation.

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pounds, on the day of now next ensuing; the sum of pounds on the day of then next following; and the sum of pounds on the day of in the year 18 ; *Together* with interest, after the rate aforesaid, on each of the said days of payment, for the said principal sum of pounds, or so much thereof as at or immediately before the payment of such instalments shall be due and owing, without," &c. *ut supra.*

(*i*) As to the penalty of a bond, *vide post*, 199, (*a*). Penalty.

[The condition of a bond is to be construed by its own terms, and no evidence can be received to explain its import; but although the meaning be not quite clear, yet if there is enough to shew the intention of the parties, the court will give effect to it. *Exparte Heurne*, 1 Buck, 165. *Ed.*] Construction of condition.

CHARGE AND AGREEMENT FOR MORTGAGE ON LANDS, INDORSED ON BOND.

INDORSEMENT *on a Bond, whereby the Obligor* CHARGES *Freehold and Leasehold Premises with the Money and Interest secured by the Bond, and a Judgment : and* AGREEMENT *that he, his Heirs, &c. will, at the Obligee's Request, execute a Mortgage of the Premises.*

Charge by obligor on freeholds and leaseholds, of a sum and interest secured by bond and judgment; and agreement that he, his heirs, &c. will, at obligee's request, execute a mortgage of the premises.

I the within named [*obligor*], *do* hereby charge *All* my freehold and leasehold messuages, lands, tenements, and hereditaments, in , in the county of , with the payment of the sum of pounds and interest, secured by the within written bond, and the judgment attending the same: AND I promise and agree, that I, my heirs, executors, and administrators, shall and will, at the request of the within named [*obligee*], his executors, administrators, or assigns, make, do, and execute all such acts and conveyances as the counsel of the said [*obligee*], his executors, administrators, or assigns, shall advise, for the more effectual charging the said premises, by way of mortgage, with the payment of the said sum of pounds, and interest. WITNESS my hand (*a*) this day of , 18 .

(*a*) It seems prudent to add, "and seal." *Vide ante*, Vol. II. 637 (*d*); 401; 588, (*d*); 633; 642.

PAYMENT BY FOUR INSTALMENTS.

BOND *from one Obligor to two Obligees, for Payment of* 1180*l.* *by Four* INSTALMENTS; *which the Obligees have agreed to take in full discharge of a Debt of* 3030*l.*, *if the Instalments should be regularly paid, but not on Failure thereof: and* AGREEMENT *by the Obligor, that if the Instalments are not duly paid, such Payments as shall be made shall only be a partial Discharge of the* 3030*l.*

KNOW ALL MEN BY THESE PRESENTS, *That* I, [*obligor*] of, &c. am held and firmly bound to [*two obligees*] of, &c. in the sum of 6000*l.* (*a*), *ut ante*, 179, 180.

Obligation from one to two.

Recital of obligor being indebted to obligees;

WHEREAS the above bounden [*obligor*] is, and stands justly and truly indebted unto the above named [*two obligees*], in the sum of 3030 pounds of lawful money of Great Britain [and Ireland]. AND WHEREAS the above bounden [*obligor*] is unable to fully satisfy and pay to the said [*two obligees*] the said debt or sum of 3030 pounds; and there-

his inability to pay;

and obligees' agreement to

(*a*) The penalty of a bond for payment of money is generally double the amount of the principal sum to be thereby secured. If the money be not paid at the time limited in the condition, the bond becomes forfeited, or absolute at law. On the forfeiture of a bond, the whole penalty was formerly recoverable at law; but the courts of equity interposed, and would not permit a man to take more than in conscience he ought; namely, his principal, interest, and expenses. And the like practice having gained some footing in the courts of law, the statute 4 & 5 Ann. c. 16, s. 12 & 13, at length enacted, in the same spirit of equity, that in case of a bond, conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge. 2 Bla. Com. 341.

Although the penalty of a bond be forfeited, yet a tender or payment of principal, interest, and costs, is a full satisfaction.

Mr. Justice Buller held, that interest beyond the penalty of a bond,

Where money

PAYMENT BY FOUR INSTALMENTS.

fore the said [*two obligees*], at the earnest entreaty and solicitation of the above bounden [*obligor*], have agreed to accept and take from the above bounden [*obligor*], the sum of 1180 pounds of lawful money of Great Britain [and Ireland], payable by instalments, as hereinafter is mentioned, in full satisfaction and discharge of the said debt or sum of 3030 pounds, provided the said sum of 1180 pounds be regularly paid, as hereinafter mentioned; but in case of failure thereof, then the same is not to be considered and taken in full satisfaction and discharge of the said debt or sum of 3030 pounds, but only of so much thereof, as such payments as shall be made thereof, will extend to pay.

accept part by instalments in discharge of the whole,

if the instalments are regularly paid; but not on failure thereof.

Condition of a bond from one to two, for payment of a sum by four instalments.

NOW THE CONDITION of the above written bond or obligation is such, that in case the above bounden [*obligor*], his heirs, executors, or administrators, or any of them, do and shall (*b*) well and truly pay or cause to be paid unto the above named [*two obligees*], their executors, administrators, or assigns, the full and just sum of 1180 pounds of lawful money of Great Britain [and Ireland], by instalments, and in manner hereinafter mentioned; that is to say; the sum of 295 pounds, part thereof, within six months next after the day of the date of the above written bond or obligation; the further sum of 295 pounds, within twelve

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is secured by bond only, interest cannot be recovered beyond the penalty.

might be recovered in a court of law in the shape of damages. Lord *Lonsdale* v. *Church*, 2 Durnf. & East, 338. But that decision is now overruled; and the established principle is, that when money is secured by bond only, the penalty is the debt both at law and in equity; *Clarke* v. *Seton*, 6 Ves. 415; and therefore a bond creditor cannot recover interest, which with the principal will extend beyond the penalty of the bond: *Brangwin* v. *Perrot*, 2 Wm. Bla. 1190; *Wilde* v. *Clarkson*, 6 Durnf. & East, 303; *Gibson* v. *Egerton*, Dick. 409; *Kettleby* v. *Kettleby*, Ibid, 514; *Tew* v. Earl of *Winterton*, 3 Bro. C. C. 489; *Knight* v. *Maclean*, Ibid, 496; [*Hellen* v. *Ardley*, 3 Carring. & Payne, 12.]; excepting under special circumstances. 6 Ves. 416. [See *post*, 448 & 460.]

Interest may be recovered beyond the pe-

For instance; if a *judgment* be recovered on a bond, then, in an action on the judgment, interest may be recovered in damages beyond the

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(*b*) "Do and shall," is not, in the above instance, grammatically correct; the proper expression is "should." *Vide ante*, Vol. II. 599, (*b*).

calendar months next after the day of the date of the above written bond or obligation; the further sum of 295 pounds within twelve calendar months next after the day of the date of the above written bond or obligation; and the further sum of 295 pounds, to make up and complete the said sum of 1180 pounds, within eighteen calendar months next after the day of the date of the above written bond or obligation; *Then*, and in such case, the above written bond or obligation shall be null and void: *But* in case of failure in payment of all and every, or any of the several sums of money aforesaid, within the respective times aforesaid, the said bond or obligation is to, and shall, be and remain in full force and virtue.

PAYMENT BY FOUR INSTALMENTS.

AND the above bounden [*obligor*] doth hereby expressly declare and agree (*c*), that in case of failure in making the several payments aforesaid, or any of them, within the respective times aforesaid, this bond, or any payment or payments to be made under the same, shall not be construed or taken as a satisfaction or discharge of the said debt or sum of 3030 pounds, or of any further or other part

Agreement by obligor, that if instalments are not duly paid, such payments as shall be made, shall only be a partial discharge of the original debt.

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penalty of the bond; and in this respect there is no difference between a foreign judgment (*ex gratia*, a judgment recovered in Ireland, &c.), and a judgment in a court of record here. *M'Clare* v. *Dunkin*, 1 East, 436. [And where a bond was conditioned for the payment of the same sum as the penalty, *with interest*, interest may be given by way of damages, for the detention of the debt. *Francis* v. *Wilson*, 1 Ry. and Moo. 105. *Ed.*]

nalty, in an action on a judgment on the bond.

So in equity, interest beyond the penalty was allowed to a judgment creditor, trustee in possession, under the will of his debtor, and as such applying the whole of the rents in the discharge of other debts, and not retaining any part for his own debt. *Atkinson* v. *Atkinson*, 1 Ball and Bea. 238. So if the party be by injunction prevented from recovering his debt at law, while the demand was under the penalty; *Duvall* v. *Terry*, Show. P. C. 15; 6 Ves. 79; 2 Ves. jun. 93; or if an *elegit* creditor be called to an account in equity, the principal and interest may be recovered, although the interest carries the debt beyond the penalty. These instances are exceptions to the rule in equity, that a party shall not in the Master's office, be allowed interest beyond the penalty, against the assets of a deceased debtor. 1 Ball & Bea. 239. Where a bond is only a collateral security, interest may be carried be-

In equity there are exceptions to the rule, that interest shall not be allowed beyond the penalty.

PAYMENT BY FOUR INSTALMENTS.

thereof, than so far as the money paid under this bond shall and will extend to pay and discharge the said debt or sum of 3030 pounds.

Attestation.

SIGNED, SEALED, AND DELIVERED by the above-named [*obligor*] and [*obligees*] (*d*), (being first duly stamped (*c*),) in the presence of

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yond the penalty. *Kerwin* v. *Blake*, 14 Vin. Abr. 460, pl. 4. So, interest will be given beyond the penalty of a bond, upon a mortgage for the same debt, though by a surety. *Clarke* v. Lord *Abingdon*, 17 Ves. 106. (See *Lloyd* v. *Hatchett*, 2 Anstr. 527, *contra*.) Therefore if a bond creditor also takes a promissory note with interest, he may recover interest beyond the penalty of the bond. 2 Ves. jun. 718. So if an obligor goes into a court of equity for relief as plaintiff, although he submits to nothing, yet by the mere circumstance of filing the bill, he would be taken to submit to every thing conscience and justice require: and upon that principle, before granting the relief prayed for, the court would compel him to pay the principal, interest, and costs occasioned by his delay. *Pulteney* v. *Warren*, 6 Ves. 92. But equity will never carry interest beyond the penalty, where there has been no demand for many years. *Galway* v. *Russell*, 14 Vin. Abr. 460, pl. 2. [On a bond to indemnify against another bond, the penalty of the latter seems to be the only measure of damages, although it does not appear that the plaintiff has been actually compelled to pay it. *Wood* v. *Wade*, 2 Stark. N. P. C. 167. *Ed.*]

(*d*) As the obligees by the recital agree to take the sum secured by the bond as a discharge for the debt, they should sign the bond at least.

An agreement in a bond respecting some matter incident to the bond, does not require an agreement stamp.

(*c*) Notwithstanding the agreement at the end of the bond, an agreement stamp does not appear to be necessary, because it is a modification of the terms on which the bond is given. Thus in *re Wansborough* v. *Dyer*, 2 Chit. Rep. 40, an objection was taken to the stamp on an arbitration bond, because, after all the usual clauses, a stipulation was inserted respecting the manner in which the costs should be paid. This was contended to be a substantive agreement, and required an agreement stamp: but the court overruled the objection. [And see *Dearden* v. *Binns*, 1 Man. & Ry. 130.]

BOND *from One to One for Payment of the Principal Sum at the end of Eight Years; and for Payment of Interest thereon in the mean time Quarterly: but if Default should be made in paying the Interest for Twenty-eight Days after each Quarterly Day, and after Demand, then the Whole of the Principal and Interest to become immediately due: with a* PROVISO, *that the Bond is given on condition, that Notice of every Assignment shall be given to the Obligor's Solicitors, or otherwise the Obligation not to become forfeited, nor any Assignee be entitled to demand Principal or Interest.*

PAYMENT OF PRINCIPAL AT END OF EIGHT YEARS, AND INTEREST IN MEAN TIME.

KNOW ALL MEN BY THESE PRESENTS, *That* I, Peter Benjamin Duke of , am held and firmly bound to [*obligee*] of, &c. in the sum of 1100*l.* &c. *ut ante*, 179.

Obligation from one to one.

THE CONDITION of the above written obligation is such, that if the above bounden Peter Benjamin Duke of , his heirs, executors, or administrators, should, on or before the (10th) day of (July,) in the year 18 , well and truly pay, or cause to be paid, unto the above named [*obligee*], his executors, administrators, or assigns, the principal sum of 550 pounds of lawful money of Great Britain [and Ireland]; AND also should, in the mean time, and until the said principal sum of 550 pounds shall become due, and until the same, and every part thereof, shall be fully paid, well and truly pay, or cause to be paid unto the said [*obligee*], his executors, administrators, or assigns, interest after the rate of five pounds per centum per annum for the said principal sum of 550 pounds, or for so much thereof as shall from time to time remain due and unpaid, by equal quarterly payments, on the day of , the day of , the day of , and the day of in every year, or within twenty-eight days next after each quarter's interest shall become due; *Then* the above written obligation shall become void, and of no

Condition of a bond for payment of the principal sum at the end of eight years;

and for payment of interest thereon in the mean time quarterly;

PAYMENT OF PRINCIPAL AT END OF EIGHT YEARS, AND INTEREST IN MEAN TIME.

effect: [But if default should be made in payment of the said principal sum of 550 pounds, or any part thereof, on the (10th) day of (July), 18 ; or if default should be made in payment of the interest of the said principal sum of 550 pounds, or any part thereof, for the space of twenty-eight days next after each or any quarterly payment of such interest shall become due, according to the stipulations aforesaid (the same having been demanded by note in writing or otherwise); *Then* the said obligation shall be and remain in full force and virtue; and the whole of the said principal sum of 550 pounds, together with the interest accrued due in respect thereof, shall forthwith and immediately after such default shall happen, become due and payable to the said [*obligee*], his executors, administrators, or assigns.] (*a*).

but if default be made in paying the interest for 28 days after each quarterly day, and after demand, then the whole of the principal and interest to become immediately due.

Proviso that bond is given on condition that notice of every assignment shall be given to obligor's solicitors; or otherwise obligation not to become forfeited; nor any assignee be entitled to demand principal or interest.

Provided always, and the above written obligation is given and executed upon this express condition, that in case the said obligation, or the principal money and interest thereby secured, or any part thereof, should at any time hereafter be assigned, then every such assignment shall, within twenty-eight days from the date thereof, be produced and shewn to and entered in the office of [*obligor's solicitors*], of Lincoln's Inn, in the county of Middlesex (or such other person or persons as the said Peter Benjamin Duke of shall from time to time by note in writing, or otherwise, direct), or otherwise the said obligation shall not become forfeited for non-payment of the said principal money or interest so to be assigned, or of any part or parts thereof respectively; nor shall any assignee or assignees thereof be entitled to call for or receive the principal money or interest assigned to him or them respectively.

(*a*) [The provision in brackets is not necessary, except as to the qualification of the twenty-eight days, and that it is oftentimes better that the instrument should be a little longer, than that any doubt should arise upon it. The decision which renders this provision unessential, is the case of *Van Sandau* v. ———, 1 B. & A. 214; where it was held, that a bond conditioned for payment of a sum of money at a future day, and interest in the mean time, is forfeited by an accidental omission to pay the interest, and the court will not stay proceedings on the bond. *Ed.*]

PAYMENT OF MONEY LENT UNDER TESTATOR'S AUTHORITY TO TWO OF HIS EXECUTORS.

BOND *from Two Trustees and Executors of a Will to the Two other Joint Trustees and Executors, for the Payment of a Sum authorized by the Testator to be lent to the Obligors for a limited Period; and for Payment of Interest in the mean time, until Payment of the Principal; the Principal and Interest to be paid according to the Directions of the Will.*

Joint and several obligation from two to two.

KNOW ALL MEN BY THESE PRESENTS, *That* we [*obligor*] of, &c. and [*other obligor*] of, &c. are held and firmly bound to [*obligee*] of, &c. and [*other obligee*] of, &c. in the penal sum of thousand pounds of lawful money of [the united kingdom of Great Britain and Ireland, current in] Great Britain, to be paid to the said [*two obligees*], or to their certain attorney, executors, administrators, or assigns; *For* which payment to be well and truly made, we jointly bind ourselves, our heirs, executors, and administrators; *and* each of us severally, separately, and apart from the other of us, bindeth himself, his heirs, executors, and administrators, firmly by these presents; *Sealed* with our seals: DATED this day of , in the year one thousand eight hundred and .

Condition for payment into the bank of a principal sum, authorised by a testator to be

THE CONDITION of the above written bond or obligation is such, that if the said [*two obligors*], or either of them, their, or either of their heirs, executors, or administrators, should well and truly pay, or cause to be paid (*a*)

Observations on the above condition.

(*a*) In the above instance, the testator authorized the obligees to lend the obligors a certain sum for a limited period, and required the obligees to take the obligors' bond for the money. The obligors being trustees and executors of the testator's will jointly with the obligees,

PAYMENT OF MONEY LENT UNDER TESTATOR'S AUTHORITY TO TWO OF HIS EXECUTORS.

lent obligors for a limited period; and for payment of the interest to testator's widow for her life; and after her death, into the bank; the principal and interest to be paid according to the directions of the will.

into the Bank of England, to the account of the personal representatives for the time being of the testator hereinafter named, the sum of thousand pounds of lawful money of [the united kingdom of Great Britain and Ireland, current in] Great Britain; And in the mean time, until payment of the said sum of thousand pounds, should pay to the said (*b*) [*first obligee*] (*c*), while living, and after her death, into the said Bank, to the like account as aforesaid, interest for the same thousand pounds, after the rate of five pounds for one hundred pounds for a year, and without any deduction or abatement whatsoever; *The* same sum of thousand pounds, and interest, to be paid at the times, and according to the purport and true intent and meaning, and for the purpose of the last will and testament (*d*) of [*testator*], late of, &c. deceased, the father of the above bounden [*two obligors*], being a will bearing date on or about the day of , one thousand eight hundred and , and shortly after the decease of the said [*testator*], and on or about the day of last past, duly proved by the said [*two obligees*], and the above bounden [*two obligors*], the executors thereof, in the Prerogative Court of Canterbury; *Then* the above written bond or obligation shall be void and of no effect, or otherwise shall be and remain in full force and virtue.

Short reference to will.

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the counsel who settled the draft of the above bond, thought it advisable that the payment should be made into the Bank. But as the propriety and the necessity of such a mode of payment appears to be doubtful, perhaps it might have been better to have followed the usual form; thus:

COMMON FORM. "unto the said [*two obligees*], their executors, administrators, or assigns, the sum," &c. *ut supra.*

COMMON FORM. (*b*) "[*two obligees*], their executors, administrators, or assigns, interest for the same," &c. *ut supra.*

(*c*) The first obligee was entitled to the interest of the residue of the testator's personal estate, out of which the sum was advanced.

(*d*) Many persons would, in the above instance, have recited every part of the will having any relation to the money authorized to be lent to the obligors; but it would be useless, for even then a general reference must have been made to the will.

BOND *by two Legatees under a Will for Payment of an* ANNUITY *to the Widow of the Testator, for her Life, with a Proportional Part to the Time of her Decease, pursuant to, and in Satisfaction of a Condition, on which the Bequest to the Obligors was made.*

TO PAY AN ANNUITY, PURSUANT TO THE CONDITION OF A BEQUEST.

KNOW ALL MEN BY THESE PRESENTS, *That* we [*obligor*] of, &c., and [*other obligor*] of, &c., are held and firmly bound to [*obligee*] of, &c. widow, in the penal sum of 2000*l.* of, &c., *ut ante*, 179.

Obligation from two to one.

THE CONDITION of the above written bond or obligation is such, that if the said [*two obligors*], or either of them, their, or either of their heirs, executors, or administrators, should during the natural life of the said [*obligee*], well and truly pay, or cause to be paid, unto the said [*obligee*], or her assigns, *One* annuity, or clear yearly sum of one hundred pounds of lawful money of [the United Kingdom of Great Britain and Ireland, current in] Great Britain, by half-yearly payments, to be made on the twenty-fourth day of June, and the twenty-fourth day of December, in every year, by even and equal portions, and clear of all deductions on any account whatsoever; AND should make the first half-yearly payment of the said annuity on the twenty-fourth day of June next ensuing the date of the said bond or obligation, provided the said [*obligee*] should be then living: AND in the event of the death of the said [*obligee*] between, or in the interval of any of the said half-yearly days of payment, and either before or after the said twenty-fourth day of June next; then if the said [*two obligors*], or either of them, their, or either of their heirs, executors, or administrators, should also well and truly pay, or cause to be paid unto the executors, administrators, or assigns of the said [*obligee*], such part of the said annuity of one hundred pounds

Condition for payment of an annuity half yearly:

the first payment to be made on a certain day, if the obligee should be living;

and if the obligee dies in the interval of any of the days of payment, then a proportional part to the day of her decease;

TO PAY AN ANNUITY, PURSUANT TO THE CONDITION OF A BEQUEST.

as shall be in proportion to the time or number of days which, inclusive of the day of the decease of the said [*obligee*], shall have elapsed prior to her decease, and after the day of payment next and immediately preceding that event; AND ALSO if the said [*two obligors*], or either of them, their, or either of their heirs, executors, or administrators, should make the payment of such proportional part of the said annuity of one hundred pounds, as soon after the decease of the said [*obligee*] as demand shall be made thereof, by the executors, administrators, or assigns of the said [*obligee*], and clear of all deductions whatsoever; (*Which* bond is given according to, and in pursuance and in satisfaction of, the intent and meaning of the last will and testament of [*testator*], late of, &c., deceased, the father of the above bounden [*two obligors*], bearing date on or about the day of , 18 , and shortly after the decease of the said [*testator*], and on or about the day of last past, duly proved by the said [*obligee*] and [*another executor*], and the above bounden [*two obligors*], the executors thereof, in the prerogative court of Canterbury;) *Then* the above written bond or obligation shall be void and of no effect, or otherwise shall be and remain in full force and virtue.

such proportional part to be paid on demand, and clear of all deductions.

Statement that bond is given pursuant to testator's will.

Attestation.

SEALED AND DELIVERED in the presence of }

POST OBIT BOND (*a*), *with a Surety, for securing a Sum to a Purchaser, if the Vendor should survive his Father or* (*b*) *Grandfather.*

CONTINGENT POST OBIT, WITH SURETY.

BOND in the penal sum of 5000*l.* from [*principal*] and [*surety*], jointly and severally, to [*obligee*], *ut ante*, 179.

Obligation two to one jointly and severally.

WHEREAS the above named [*obligee*], hath contracted and agreed with the above bounden [*principal*], for the

Recital of contract for purchase of 2500*l.*

(*a*) There are two classes of *post obit* securities: in the first class, the payment of a greater sum than the sum advanced, depends on a contingency: in the second class, the payment of a greater sum than the sum advanced is certain, but the time of payment depends on a contingency. The above precedent is an instance of the first class: the succeeding precedent is an instance of the second class.

Two classes of *post obit* securities.

1st. A *post obit* security for payment of a greater sum than the sum advanced, if it depends on a *bonâ fide* contingency, is not liable to be impeached on the ground of usury. Hawk. Pleas of the Crown, ch. 82. sec. 16. p. 530. 6th ed.; and see *Wharton* v. *Muy*, 5 Ves. 27. Or in the language of Mr. Justice Burnet, "a bargain on a mere contingency, where the reward is given for the risque, and not for the forbearance, is not usurious; for how can it be said, with any propriety, to be for the forbearance, when the day of payment itself may never come?" *Chesterfield* v. *Janssen*, 1 Atk. 340. If, therefore, a man gives or lends money, not to be repaid if the event should be one way, but double if the other, and it is uncertain which way it will happen, it is

A *post obit* security, depending on a *bonâ fide* contingency, is not usurious.

(*b*) This bond being for payment of 2500*l*, in consideration of 1000*l.* and being also on a double contingency in favour of the obligee, it appears liable to the objection in *Curwyn* v. *Milner*, 3 P. Wms. 292. n. *post*, 220; unless that advantage was counterbalanced by the ill health of the obligor.

Prima facie, the above consideration appears inadequate.

in the event of vendor surviving his father or grandfather:

purchase of the sum of 2500*l.* to be paid to him the said [*obligee*], his executors, administrators, or assigns, in the

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But if the treaty be for a loan, and a colourable contingency be inserted, it is usurious.

not within the statute. But if, under colour of such an hazardous bargain, the real treaty is for a loan, with an usurious reward for that loan, and a contingency is inserted to evade the statute, the contingency inserted is of little moment, being no ingredient between the parties. The court, or a jury, on the whole may pronounce such a contract usurious, notwithstanding the colour of contingency, if they are satisfied the reward is given for the forbearance, not for the risk; as in adding a contingency, if a single healthy life should survive half a year: so they might as well add a contingency, if any one of six persons was alive at the end of six months; and one of the cases is, if any one of three persons is alive at that time. The intent of the bargain is the material thing: if that intent was borrowing the money, it is within the statute, whatever colourable contingency is inserted. For if in truth the contract be usurious against the statute, no colours or shew of words will serve; but the party may shew it, and shall not be concluded or estopped by any deed, or any other matter whatsoever; for the statute gives averment in such case. *Burton's* case, 5 Co. 69. b. *Clayton's* case, 5 Co. 70. S. C. *Reynolds* v. *Clayton*, 2 And. 15. Moore, 397. *Mason* v. *Abdy*, Comb. 125. S. C. 3 Salk. 390. Carth. 67; and see *Mastin* v. *Abdee*, 1 Show. 8. But where the principal was fairly and truly put in hazard, and such as none would run for the interest the law allows, there is no case where it has been held within the statute. *Chesterfield* v. *Janssen*, 2 Ves. 142—3. The facts of that celebrated case were shortly these: The honourable John Spencer, who was out of parental authority, and was then possessed of a large fortune, to which he expected a considerable increase upon the death of the Duchess of Marlborough, had contracted very heavy debts, which caused him to be much pressed for ready money. Accordingly, in May 1738, in consideration of 5,000*l.* paid to him by Sir Abraham Janssen, Spencer gave him a bond in the penalty of 20,000*l.* to pay him 10,000*l.* in case he (Spencer) should outlive the Duchess. The age of Spencer was then thirty; that of the Duchess seventy-eight; but she was regarded as strong and healthy for her years; while he, by intemperance, had materially injured his constitution. In October, 1744, about six years after the making of the bargain, the Duchess died; and in December following, Mr. Spencer, being then unable to pay the 10,000*l.*, on the defendant's delivering to him the bond above mentioned to be cancelled, he executed a new bond, whereby he became bound to the defendant in the penalty of 20,000*l.* conditioned for pay-

No estoppel as to usury.

Post obit bond to pay double the sum advanced if obligor survived another, held not usurious.

event of his, the said [*principal*], surviving either his father, [of, &c., or his grandfather,] of, &c., but not [CONTINGENT POST OBIT, WITH SURETY.

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ment to the defendant of 10,000*l.* with lawful interest, on the 19th of April then next; and at the same time executed a warrant of attorney to confess judgment on the bond, at the defendant's suit, for the 20,000*l.* penalty, on which judgment was entered. Afterwards, at two different times, Spencer paid two several sums of 1,000*l.* in part of the debt; and in June 1746, he died. After Spencer's death, the defendant sued a *scire facias* against his executors for an execution, and they filed a bill in Chancery, on the ground that the contract was unreasonable and usurious; praying for an injunction, and that the defendant might be adjudged a creditor of Spencer, *pari passu* with his other creditors, for so much of the 5,000*l.* as remained due, together with interest. The case was argued at great length before Lord Chancellor Hardwicke, who was on this occasion assisted by the Lord Chief Justice Lee, Sir John Strange, then Master of the Rolls, Lord Chief Justice Willes, and Mr. Justice Burnett. On the part of the plaintiffs it was argued, that this was an usurious bargain; while for the defendant it was insisted, that as the 5,000*l.* was not to be paid at all events, but only in case Mr. Spencer survived the Duchess, the defendant ran the hazard of losing the 5,000*l.* and the interest which he might have made of it; and that therefore the case fell clearly within the doctrine laid down in *Sharpley* v. *Hurrel*, Cro. Jac. 208, and *Bedinfield* v. *Ashley*, Cro. Eliz. 741, and could not be considered as usurious. The whole court gave their opinions *seriatim*, and agreed unanimously, that the bargain was not usurious. And see *Button* v. *Downham*, Cro. Eliz. 642. *Lamego* v. *Gould*, 2 Burr. 715.

If obligor-pays part of expense of insuring life, on which contingency depends, contract may be set aside, on paying sum advanced, with interest, after deducting sums paid by obligor for insurance.

The only ground which takes such instances out of the application of the statutes against usury, is the risk of the principal lent; therefore, if the defendant be indemnified by an insurance on the life on which the contingency depends; of which insurance the obligor bears any part of the expense, although it be no part of the written contract, a court of equity will order the bond to be cancelled, on payment by the plaintiff of the money actually advanced, and interest at 5*l.* per cent. from the time of its advancement, after deducting all sums of money paid by the obligor for insurance on his life. For the obligor ought not, either by a verbal agreement or understanding, or by the terms of the contract, to have any such obligation fixed on him in a *post obit* transaction; the risk to be run being the sole cause of the great difference in such matters, between the sum advanced, and the

payment of purchase money:

otherwise, at or for the price or sum of 1000*l.* AND WHEREAS, in pursuance of the said recited contract, he the

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sum stipulated in a certain event to be received. *Evans* v. *Chesshire*, Belt's Sup. to Ves. sen. 311, 313; and see *Chesterfield* v. *Janssen*, 2 Ves. 142.

2dly. In the second class of *post obit* securities, the borrower secures to the lender a greater sum than the sum advanced, to be paid on the death of a particular person or persons, whether the borrower be, or be not then alive. Thus in *Batty* v. *Lloyd*, 1 Vern. 141, the defendant had agreed with the plaintiff, who was to have an estate fall to her after the death of two old women, to give her 350*l.* in consideration of being paid 700*l.* at the death of the two women; and the plaintiff was to secure this 700*l.* on a mortgage of her reversionary estate. It happened that both the women died within two years afterwards. And now the bill was to be relieved against this bargain. *Sed non allocatur*; though the case of *Nott* v. *Hill* was cited, where relief was given in such a case as this; the plaintiff in that case being prevailed upon through his necessities. Lord Keeper North said, "I do not see any thing ill in this bargain. I think the price was the full value, though it happened to prove well. Suppose these women had lived twenty years afterwards; could Lloyd have been relieved by any bill here? I do not believe you can shew me any such precedent. What is mentioned of the plaintiff's necessities, is as in all other cases. One that is necessitous must sell cheaper than those who are not. If I had a mind to buy of a rich man a piece of ground that lay near mine, for my convenience, he would ask me almost twice the value: so where people are constrained to sell, they must not look to have the fullest price: as in some cases that I have known, where a young lady that has had 10,000*l.* portion payable after the death of an old man, or the like, and she in the mean time becomes marriageable, this portion has been sold for 6000*l.* present money, and thought a good bargain too. It's the common case; pay me double interest during my life, and you shall have the principal after my decease." But see *Berny* v. *Pitt*, 2 Vern. 14, *post*, 214. The case of *Gowland* v. *De Faria*, 17 Ves. 20, *post*, 215, also ranks under this class; for there the annuity was certainly to take effect, but the time when the payment of it was to commence, depended on a contingency; the only objection was inadequacy of consideration.

One entitled to an estate after the death of two old lives, takes 350*l.* to pay 700*l.* when the lives fall, and mortgages the estate as a security, no relief against this bargain, though both the lives died within two years.

Courts of law will not facilitate an immedi-

Although courts of *law* cannot relieve against a *post obit* security, on the ground of its being an unconscionable bargain, against which

said [*obligee*], hath paid the sum of 1000*l.* of lawful money of Great Britain [and Ireland], unto the said [*principal*], CONTINGENT POST OBIT, WITH SURETY.

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relief can be obtained in a court of equity only; yet courts of law will not facilitate an immediate execution on a *post obit* judgment. Thus in *Lushington* v. *Waller*, 1 Hen. Bla. 94, on a motion to enter up judgment on a warrant of attorney, on an affidavit stating that a bond for 1800*l.* was given by the defendant to the plaintiff in the year 1780, conditioned for the payment of 900*l.* (in consideration of 400*l.* advanced at the time of the execution of it,) on the death of the defendant's father, in case the defendant should survive, together with the warrant: that the father died in September last, and the son was still living. But the Court said, that in common cases, where judgment has not been entered on a warrant of attorney within a year and a day from the date, it was necessary to apply to the court for leave to enter it; as this was a *post obit* bond, a security of a questionable nature, which had been often disputed with success, leave to enter up judgment ought not to be granted without a rule to shew cause. If judgment is entered immediately on giving the warrant, or within a year and a day after, transactions of this sort may probably be brought to the knowledge of the family of the obligor, and a guard raised against fraud and imposition. But if the obligee waits till the death of the father or relation, the court will prevent his having immediate execution, by which he might force the obligor to submit to such terms as he should think proper to impose; and will require him to give due notice of his intention.

ate execution on a *post obit* judgment. Where judgment has not been entered within a year and a day, on warrant of attorney given with a *post obit* bond, and the obligee does not apply to the court for leave to enter it, till after the death of the person on whose death it is payable, the court will not grant leave, without a rule to shew cause. A *post obit* bond is a security of a questionable nature.

In a court of *equity*, inadequacy of price is a sufficient ground for relieving against *post obit* securities, given by persons who have no present property, but only expectations from persons living; although there is nothing attending the contract which approaches to fraud or imposition. *Peacock* v. *Evans*, 16 Ves. 515. *Evans* v. *Griffith*, cited 17 Ves. 21, 24. [*Ryle* v. *Brown*, 13 Pri. 758. *Sed semble contra*, *Headen* v. *Rosher*, 1 M'Clell. & Yo. 89.] The court has gradually extended its protection; for at first the cases are, where there is express proof of gross practice, or actual imposition: from thence it went to cases where, on the face of the contract, it was so gross and unreasonable a contract between the parties, the court, on presuming a man would not enter into it but by imposition, has relieved; of which, one case among many is, *Nott* v. *Hill*, 1 Vern. 167. *Vide ante*, Vol. I. 151, (*a*). As the mischief increased, the court has extended its remedy. 2 Ch. Rep. 397. Where the bargain is so lucrative, and the person under necessity, so that the judgment of the court has been,

In equity, inadequacy of price is sufficient for relieving against *post obit* securities, by persons who have no present property.

CONTINGENT POST OBIT, WITH SURETY.

at, or before the sealing and delivery of the above written obligation; the receipt whereof accordingly the said [*prin-*

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that necessity alone could induce to make the contract, there has been relief. 2 Ves. 145. Thus in *Berney* v. *Pitt*, 2 Ch. Rep. 397. 2 Vern. 14. S. C. cited 2 Ch. Ca. 137, and corrected from the Register's book, 3 P. Wms. 293, [D.], the plaintiff's father being only tenant for life of a real estate, which after his death would come to the plaintiff, and the plaintiff's father allowing him but a small subsistence, he borrowed of the defendant two sums of 1000*l.*, and gave two warrants of attorney to confess judgment for 5000*l.* each, defeazance for payment of 2500*l.* each, if the plaintiff should outlive his father; and if the plaintiff should marry in his father's life-time, then he should from such marriage, during his father's life, pay the defendant interest for each sum of 2500*l.* Lord Nottingham decreed the plaintiff to pay to the defendant 5000*l.* with interest. But Lord Jefferies reversed the decree, and ordered the defendant to repay the plaintiff what he had paid under the decree beyond the principal money and interest. 3 P. Wms. 293, [D].

Judgment to pay 5000*l.* *post obit*, in consideration of 2000*l.*, relieved against.

A *post obit* bond given by an expectant heir, for payment of 600*l.* within a year after the death of his father, in consideration of 100*l.*, was relieved against on repayment of the 100*l.* with interest. *Varnee's* case, 2 Freem. 63. And see Lord *Ardglasse* v. *Muschamp*, 1 Vern. 239. And in *Evans* v. *Griffith*, cited 17 Ves. 21, 24, the plaintiff was to repay four times the amount of the sum advanced, if he survived his father; although there was no fraud, yet the contract was set aside for inadequacy of consideration.

Bond to pay 600*l.* *post obit*, in consideration of 100*l.* relieved against.

To expectant heirs, the Court of Chancery seems to have extended such a degree of protection, as nearly renders them incapable of binding themselves by any contract. *Peacock* v. *Evans*, 16 Ves. 514. In *Gwynne* v. *Heaton*, 1 Bro. C. C. 9, Lord Thurlow says, "there is a policy in justice protecting the person who has the expectancy, and reducing him to the situation of an infant, against the effects of his own conduct. The court avows the disability, but not the length to which it disables." Lord *Ardglasse* v. *Pitt*, 1 Vern. 239. Sir William Grant says, "the tendency of this doctrine to render all bargains with such persons very insecure, if not altogether impracticable, seems not to have been considered as operating to prevent its adoption and establishment: but, on the contrary, some judges have avowed that probable consequence as being to them the recommendation of the doctrine." *Peacock* v. *Evans*, 16 Ves. 514.

To expectant heirs, Chancery extends protection, approaching incapacity to bind themselves.

The court avows the disability, but not the length to which it disables.

The tendency of the doctrine to render such contracts insecure, some judges have thought a recommendation of it.

It has been urged in favour of the doctrine, "that the ill tendency

cipal] doth hereby acknowledge. AND WHEREAS upon the treaty for the purchase of the said contingent sum of

and agreement that contingent sum should

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of heirs contracting with strangers to furnish their wants, is to make them quit a regular family life and dependency, to withdraw from advice and counsel of friends, and to have youth supplied with the means of gratifying their passions; and the bringing people together on the worst principles on which men may contract, avarice on one side, and a craving appetite on the other. The greediness of gain is the only principle on which a stranger can be induced to furnish a stranger; and the occasion of applying to a stranger is, because the wants are such as he would not reveal to his family; which tends to a delusion in what is of general concern—the provision for posterity." *Chesterfield* v. *Janssen*, 2 Ves. 144. And in the same case Lord Hardwicke says, "In most of these cases have concurred deceit and illusion on other persons not privy to the fraudulent agreement: the father, ancestor, or relation from whom was the expectation of the estate, has been kept in the dark; the heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief, and also reformation. This misleads the ancestor; who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons, who have divided the spoil before-hand." *Chesterfield* v. *Janssen*, 2 Ves. 157. 144. 1 Atk. 352, S. P. *Sed vide ante*, Vol. I. 151, (*a*).

The principle is public policy, in order to prevent deception on parents and ancestors.

The person who takes a *post obit* security, has the *onus* thrown upon him of proving the fairness of the bargain. *Evans* v. *Chesshire*, 1803. 1806, Belt's Sup. Ves. sen. 300. *Bowes* v. *Jacobs*, 1808, 1 Madd. Ch. 122, 2d ed. *Farmer* v. *Wardell*, cited 17 Ves. 2. *Coles* v. *Trecothick*, 9 Ves. 246. [*Davis* v. *Duke of Marlborough*, 2 Swanst. 139.] The principle and policy of the rule may be both equally questionable; *ante*, Vol. I. 156; since usurers are thereby incited to ensure themselves by their terms from the risk of the interference of the court. Montesquieu says, "usury increases in Mahometan countries, in proportion to the severity with which it is prohibited: the lender indemnifies himself against the danger of having the contract rescinded." *Esprit des Loix*, liv. xxii. chap. 19. However, the settled doctrine of courts of equity clearly lays the burthen of proving adequacy of price, on the purchaser.

Onus of proving fairness of bargain, lies on him who takes a *post obit* security.

Thus in *Gowland* v. *De Faria*, 17 Ves. 20, where the plaintiff, in 1783, being entitled to the reversion of a considerable estate in fee simple, after the death of his mother, then aged fifty-seven, in consideration of 1500*l.* he gave a bond and warrant of attorney to confess

A rent-charge of 200*l. per ann.* granted in consideration of 1500*l.* for 999

be secured by bond of vendor and his surety.

2500*l.* it was agreed that the payment thereof, in the event aforesaid, should be secured by the joint and several

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years certain, to commence on the death of a widow lady aged 57, set aside for inadequacy of price.

judgment, with a condition for paying to the defendant an annuity of 200*l.* for the term of nine hundred and ninety-nine years from the death of the plaintiff's mother, and demised the reversion for two thousand years, to a trustee, for securing the annuity, with a covenant to deliver up the title deeds on the death of his mother. The mother died in February 1808; and the bill was filed in May following; charging, that the defendant took advantage of the plaintiff's distress and inexperience; praying that the securities might be delivered up to be cancelled; and offering to repay the money advanced, with interest. Mr. Morgan, of the Equitable Assurance Office, by his depositions stated, that the value of the annuity at the time of the grant, was 2308*l.* For the defendant it was urged, (among other points noticed in the judgment,) that an expectant heir must look in that character to the person from whom he is to derive the estate: but that the plaintiff's father was dead, and the possession was only withheld during the life of his mother, under a limitation to her for life: and that the protection courts of equity had given to that peculiar character, could not arise out of the mere relation of mother and son. In reply for the defendant, it was urged, that any person having a reversionary interest to dispose of, is, in a court of equity, an expectant heir, whether that interest is derived from a father or any other person; and that the ground of relief had always been, that he was dealing for a reversionary interest. Sir William Grant, in delivering one of his usually luminous judgments, said, "in considering the case of *Evans* v. *Peacock*, I found the doctrine of the court perfectly established, that it is incumbent upon those who have dealt with an expectant heir relative to his reversionary interest, to make good the bargain; that is, to be able to shew that a full and adequate consideration was paid. That is undoubtedly a heavy burthen imposed upon a purchaser: but in that particular case, the burthen is imposed upon him; and that case is an exception to the general rule, that for mere inadequacy of value a contract is not to be set aside. In all these cases, the issue is upon the adequacy of the price. This is the case of a person who, in this court, is considered as an expectant heir. He has charged his reversionary interest; the question is, whether he has received an adequate consideration. Upon that question the evidence is all one way. In many of these cases very opposite opinions are given by calculators: but here Mr. Morgan's opinion is not contradicted. I must therefore take the value to be inade-

A contract with an expectant heir forms an exception to the general rule, that for mere inadequacy of value a contract is not to be set aside.

Any person having a reversionary interest, is, in a court of equity, an expectant heir.

bond of the said [*principal*], and [*surety*], as the surety for the said [*principal*].

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quate; and then I do not see how I can avoid setting aside the contract; unless the defendant can prevail upon one of the other two grounds that have been taken: first, that after such a length of acquiescence the plaintiff ought not to be permitted to set aside the contract: secondly, that the value is to be calculated upon the result, and not as it might have been estimated at the moment of the transaction. As to the first, there is, I believe, no case in which, during the continuance of the same situation in which the party entered into the contract, acquiescence has ever gone for any thing: it has always been presumed, that the same distress which pressed him to enter into the contract, prevented him from coming to set it aside; that it is only when he is relieved from that distress that he can be expected to resist the performance of the contract. As to the other ground, that in the event which has happened, a very large price has been paid by the defendant, I apprehend I cannot take that into consideration. [*Nott* v. *Hill*, 1 Vern. 168, *in margine*; 2 Vern. 27.] In the case of *Evans* v. *Peacock*, (16 Ves. 512,) I am pretty certain, that I did not lay the least stress upon the circumstance, that the death of Evans, the father, happened in a very short period after the purchase; nor allow it to weigh against Peacock, as in any degree affecting the validity of the bargain. If the contract had been fair at the moment when it took place, the accident of its becoming more advantageous by the death of one of the parties would not, according to my opinion, have varied the character of the original transaction." His Honour, therefore, granted the prayer of the bill; and interest upon the money advanced was directed, at five *per cent.*, but compound interest was refused. 17 Ves. 26. As to costs, his Honour seemed disposed to make the same decree as he had made in *Evans* v. *Peacock*, 16 Ves. 518, where, though the contract was set aside, as it was not upon the ground of fraud, he gave the defendant his costs, considering him as a mortgagee; upon the authority of *Twisleton* v. *Griffith*, 1 P. Wms. 310, before Lord Cowper: but the question of costs was compromised in *Gowland* v. *De Faria*, 17 Ves. 27. *Innes* v. *Jackson*, 16 Ves. 356, cited 17 Ves. 26, does not appear to negative the defendant's right to costs in the above case, as supposed by Sir Samuel Romilly, the plaintiff's counsel. Indeed, as costs were allowed Dr. Jackson, so far as he was actually a mortgagee, *Innes* v. *Jackson*, rather supports the right to costs in *Gowland* v. *De Faria*. The question as to costs in these cases, under

During the continuance of the same situation of distress, acquiescence has no effect.

The value is to be estimated at the time of the transaction, not according to the event.

Interest at five *per cent.* upon the money advanced, compound interest refused.

On a bill for relief against a *post obit* security, and which is set aside for inadequacy, it seems the defendant is entitled to his costs.

Condition for payment, if vendor should survive his father or grandfather.

NOW THEREFORE THE CONDITION of the above written obligation is such, that if the said [*principal*]

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ordinary circumstances, seems to be settled, and the doctrine of the court further illustrated by the case of *Bowes* v. *Heaps*, 3 Ves. and Bea. 117.

Unconscientious bargain to pay four times the money advanced, subject to the contingency of the borrower, young and in good health, surviving a young, but very bad life, and a very improbable chance of issue. The securities to stand only for the principal advanced, interest, and costs, under the circumstances: no fraud: the terms proposed by the borrower to several others being merely acceded to.

There the plaintiff was entitled in remainder after his two elder brothers, Lord Strathmore and George Bowes, under an intail, created by the will of their grandfather; and under the will of his grandmother was tenant for life in remainder of other estates after the estate for life of his brother George, with remainder to his first and other sons in tail; subject to a proviso, that, in case George Bowes, or any of his issue male, should come into possession of the other estates, the limitations as to them should cease, and those to the plaintiff should take effect. In 1804, the plaintiff being in great distress, proposed to raise the sum of 10,000*l.* by securing upon his expectancies four times the amount advanced. The defendants lent him money upon those terms; which was secured accordingly by bonds and indentures of demise, dated the 19th of March, 1804. The bonds having become absolute by the death of George Bowes, the bill was filed, praying an injunction against proceeding at law, and a declaration, that the instruments should stand as securities only for the sums actually advanced, with interest. In 1804, Lord Strathmore was at the age of thirty-five, and George Bowes thirty-two, both unmarried; and the plaintiff was twenty-seven, in good health, and temperate; George Bowes being, from habitual intemperance, in extremely bad health. He was married before the advances of the defendant Phillips. The defendants admitted they were informed by the plaintiff's agent, that George Bowes was not in good health; denying any other knowledge of it. Sir William Grant, Master of the Rolls, in delivering his judgment, said, "It is fully proved by the evidence, that George Bowes, was in a state of extremely ill health in February, 1804, and down to the time of his death. The plaintiff was in good health, and a temperate liver. The defendants admit, that they were informed by the plaintiff's agent, that George was not in good health; but they deny having any other knowledge of that fact. It is not imputed to them, that they used any endeavours to prevail upon the plaintiff to enter into this transaction. They merely acceded to the proposal that was made to them. It is not, however, every bargain, which distress may induce one man to offer, that another is at liberty to accept. The mere absence of fraud, does not necessarily decide upon the validity of the transaction; as is

The mere absence of fraud does not ne-

should be living at the time of the decease of the said [*father*], or [*grandfather*], who shall first die; and in such

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proved by many cases, from *Berney* v. *Pitt*, 2 Ch. Rep. 396; 2 Vern. 14, down to *Gwynne* v. *Heaton*, 1 Bro. C. C. 1. In the latter, Lord Thurlow says, "the defendant is not charged with misleading the plaintiff's judgment, or tampering with his poverty. In that case too, as in this, the bargain had been hawked about, and offered to many persons. That," Lord Thurlow says, "only shews the distress of the borrower." If the contingency in this case had been merely that of the plaintiff's surviving his brother George, I should not have had a moment's hesitation in setting aside the contract, on the authority of many cases, where the gain was to be less, and the risk fully as great, if not greater. The difference in point of health, was more than an equivalent for the difference in point of age; which has materially weighed in several of the cases. It would not, I think, be endured, that a money lender should take from a distressed man, dealing for his reversionary interest, an engagement to pay four for one, upon the contingency of a person, of the age of twenty-seven, in perfect health, outliving another of the age of thirty-two, debilitated by disease, and ruined in constitution by long continued habits of intemperance. But the contingency was, not merely George's dying first, but his dying without issue male Whether any individual will marry and have issue, is an event not easily reducible to calculation; but a man in such a state of health as George Bowes is described to have been, was not, according to ordinary probabilities, likely to have children. The court has not held, that a bargain depending on such a contingency, is wholly out of its reach. Lord *Ardglasse* v. *Muschamp*, 1 Vern. 237; *Wiseman* v. *Beake*, 2 Vern. 121, and *Barnardiston* v. *Lingood*, 2 Atk. 133, were cases, in which death without issue male, was the contingency upon which the lender, or purchaser, was to reap the stipulated advantage; yet the uncertainty of such a risk, did not prevent the court's setting aside the bargain in each of those cases. It was urged in this case, that the risk of the defendant Phillips was greatly increased by the circumstance, that George Bowes was married at the time of Phillips's advances. Whether he then knew that fact, does not appear. The answer does not notice it as enhancing the risk. It is to be observed, that his first advance was seven months, his second a year, after the marriage. The knowledge of it at those periods would not, in all probability, have made him think the worse of his bargain. Besides, the death of George

cessarily decide upon the validity of the transaction.

The bargain being hawked about, only shews the distress of the borrower.

The difference in point of health may be more than an equivalent for the difference in point of age.

Relief against an unconscientious bargain, upon the contingency of death without issue.

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case, if the said [*principal*] and [*surety*], or either of them, their, or either of their heirs, executors, or administrators,

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without issue, was not the sole contingency upon which the lenders were to become entitled to their fourfold return. They had likewise the chance of his succeeding to his grandfather's estate. Allowing the risk to be still considerable, against that must be set the unusual amount of the stipulated return. Combining the two together, it seems to me, that there is more inequality in this bargain than existed in some of the cases, in which the contract has been set aside. The agreement in *Berney* v. *Pitt*, [*ante*, 214,] was in consideration of 2,000*l.* advanced, to pay 5,000*l.* within a month after his father's death, if the plaintiff survived his father, otherwise the money lent not to be repaid. That in *Curwyn* v. *Milner*, 3 P. Wms. 292, n. was for 500*l.* to pay 1,000*l.* if the borrower survived his father *and** father in law: but, if he died

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In P. Wms. *Curwyn* v. *Milner*, is mis-stated: the ground of the decision being the payment of double the sum advanced, on a double contingency in favour of the lender.

* In the argument of *Chesterfield* v. *Janssen*, 2 Ves. 140, it is said and not contradicted by the plaintiff's counsel, that in *Curwyn* v. *Milner*, "it is mis-stated, *and* instead of *or*." And see 1 Atk. 334. So Mr. Justice Burnett, in delivering his opinion, says, "in *Curwyn* v. *Milner*, the contingency was double, to pay 1000*l.* for the 500*l.* lent, if the son survived his father, *or* father-in-law." 1 Atk. 343. And therefore there was a double contingency *in favour of the lender*, which, no doubt, was the ground of the determination. If the statement of *Curwyn* v. *Milner*, in P. Wms. be correct, the case is opposed by *Batty* v. *Lloyd*, 1 Vern. 141, *ante*, 212; and seems to be overruled by *Chesterfield* v. *Janssen*. For if the money was only to be paid in case the son survived his father *and* father-in-law, the risk was not equal, there being a double contingency *against the lender*, and consequently that could not be a ground for granting relief to the borrower. Besides, in *Chesterfield* v. *Janssen*, it was stated by the counsel, and by Mr. Justice Burnett, probably from their having been present at the determination, being only nineteen years before, that when Lord King decreed relief in *Curwyn* v. *Milner*, "he said, if it was new, he would not have gone so far, where such a contract was fair, and done with open eyes; saying, he thought himself bound by precedents." 2 Ves. 140, 145. 1 Atk. 334, 343. Therefore, as his Lordship would not certainly have carried his determination an *iota* beyond the precedents, and as there is no determination that when only double the sum advanced was payable on a double contingency *in favour of the borrower*, he has been re-

should well and truly pay, or cause to be paid, unto the said [*obligee*], his executors, administrators, or assigns,

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before either of them, the lender to lose the 500*l.* [The heir survived his father and father-in-law, and was relieved, though after he had paid the money, it being for fear of an execution.] I do not see, how I can refuse to relieve in this case consistently with the principles and decisions referred to, and approved by Lord Hardwicke, and the judges who assisted him, in the case of Lord *Chesterfield* v. *Janssen*, 2 Ves. 125, 1 Atk. 301; *Wharton* v. *May*, 5 Ves. 27. The defendants must have their principal and interest; and I am disposed to consider them so far in the nature of mortgagees, as to give them likewise their costs." *Gowland* v. *De Faria*, 17 Ves. 20; *Peacock* v. *Evans*, 16 Ves. 512.

Injunction, restraining action on *post obit* bond in consideration of 1000*l.* to pay 2500*l.* if either of three sons should be alive at their father's death, being obtained on paying the 1000*l.* advanced and interest, into court; a motion to dissolve injunction refused, with costs, on account of inadequacy of price, and the motion being improperly made.

But where an injunction, restraining an action on a *post obit* bond, in consideration of 1000*l.* to pay 2500*l.* if either of three sons should be alive at their father's death, having been obtained on paying the sum advanced, and interest, into court, a motion by the defendant to dissolve the injunction, was refused, with costs, on account of inadequacy of price, and the motion being improperly made. Thus in *Marsack* v. *Reeves*, 6 Madd. 108, a gentleman of the name of Marsack, eighty-two years of age, had three sons, between thirty and forty years of age, who being in want of money, borrowed 1000*l.* of the defendant, and gave a bond to pay 2500*l.* on the death of their father, provided one of the three sons should survive him. A bill was filed to have the bond delivered up, upon payment of the principal money, with interest; and for an injunction to restrain proceedings at law. An *ex parte* injunction was obtained, on payment of 1000*l.* and interest, into court. A motion was made, upon the coming in of the answer, to dissolve the injunction. In support of the motion, it was observed, there was no fraud in the transaction: that the sons were of an age* to judge for themselves: that mere inadequacy is not sufficient to set aside a contract: that the principle and policy of the rules laid

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lieved—the statement of *Curwyn* v. *Milner*, in P. Wms. cannot be correct. In *Roche* v. *O'Brien*, 1 Ball & Bea. 357, the Irish Lord Chancellor, Lord Manners, mis-states the case: he says, "there an expectant heir borrowed money, on condition to pay double the amount, if he survived his father." His lordship also states it to be Mr. Cox's note, whereas it is a note of the original editor. See 7 Ves. 446.

* [It would seem that the age of the expectant heir will not make much difference. *Davis* v. *Duke of Marlborough*, 2 Swans. 143. *Ed*

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within six calendar months next after the decease of such of them, the said [*father*] and [*grandfather*], who shall

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down as to expectant heirs and reversions, have been questioned: and that it was unconscientious in the sons to run the chance of dying before their father, and on his death to turn round upon the purchaser; treating the bond as valid or invalid, according to circumstances, and as best suited to their interests. *Whalley* v. *Whalley**, 1 Mer. 436, and *Shelly* v. *Nash*, 3 Madd. 232, *ante*, Vol. I. 154, were cited. Sir John Leach, the Vice Chancellor, said, "It has long been a settled principle of courts of equity, that those who deal with persons who have no present property, and only expectations from persons living, possess so much advantage over those with whom they deal, that this court will not permit a party so dealing to recover, unless he has given the actual value of the thing which he has purchased. Some late cases have extended this doctrine to reversions; (see *Peacock* v. *Evans*, 16 Ves. 512; *Gowland* v. *De Faria*, 17 Ves. 20;) although reversions are as much property as property in possession. If any doubt belongs to this doctrine, as applied to reversions, it does not touch this case; for this is a case of mere expectations: it is out of all question here, that the sum paid was not the actual value of this bond; and these plaintiffs are therefore entitled to sustain the injunction." The motion being refused, the counsel for the plaintiff said they were entitled to costs. His Honour observed, "If the defendant had succeeded in the motion, the costs would have been costs in the cause; but having failed in the motion, it admits of a different consideration. In a case of *Marshall* v. *Lloyd*, which came on yesterday, I had occasion to consider the point; and I desired the registrar to ascertain the practice in such cases. I have a paper from Mr. Crofts, in which he states it to be the understanding of the registrars and clerks in court, that on a motion for an injunction, refused, and on a motion to dissolve an injunction, refused, the costs, as a general rule, are costs in the cause; but that, on special occasions, the court deviates from that rule, and orders costs

On a motion for an injunction refused, and on a motion to dissolve an injunction

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Consideration of natural love and affection inserted in testatum, held to support a deed, although not mentioned in recital.

* In *Whalley* v. *Whalley*, 1 Meriv. 436, a conveyance of a reversionary interest from an uncle to a nephew, under circumstances of gross inadequacy of price, and alleged fraud, was attempted to be set aside, after forty years; but the court held it to be supported by the consideration of natural love and affection, inserted in the witnessing part of the deed, although the recital of the contract for the sale only stated the consideration to be pecuniary.

first die as aforesaid, in the life-time of the said [*principal*], the sum of 2500*l.* of lawful money of Great Britain [and

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to be paid by the party that makes the motion." The counsel for the defendant said, *bills*, like the present, are always considered, in effect, as bills to redeem, and the plaintiff pays the costs of the suit. But his Honour replied, "it is for that reason that I am disposed to give the costs of this *motion* to the plaintiff. Unless specially given to the plaintiff, the defendant will receive them as costs in the cause; but it is not reasonable that the plaintiff should pay the costs of a motion improperly made by the defendant. The motion must be dismissed, with costs."

refused, the costs, as a general rule, are costs in the cause; but on special occasions the court deviates from that rule.

If the consideration for which a *post obit* bond is to be granted, is ascertained by means of a *sale by auction, without reserve*, it seems that the court will extend its relief. Thus in *Fox* v. *Wright*, 6 Madd. 111, on a bill to be relieved from certain *post obit* bonds, Sir John Leach said, "The true effect of the case of *Shelly* v. *Nash*, (3 Madd. 232; *ante*, Vol. I. 154,) is, that every purchaser at a sale by auction of a reversion, is not necessarily bound to establish that he purchased at a full price. That he may purchase under circumstances which make it as equitable that he should have the benefit of his bargain, without such proof, as if he had bought, not a reversion, but an estate in possession. The question is, whether the present defendant purchased this *post obit* bond under such circumstances. The particulars of sale disclose, that the vendor was a young man, about to raise a sum of 40,000*l.* upon *post obit* bonds, payable at the death of his father, and that the sale of these bonds was to take place without reserve; that is, without any bidding on his part. Those who attended this auction, necessarily, therefore, knew that the vendor was a young man in distress; that he was so much pressed for money, that he undertook, with those who thought fit to be bidders, that he would not have recourse to those precautions by which every provident seller at an auction protects himself against an inadequate price; and I have to ask myself, in the language of the case of *Shelly* v. *Nash*, whether it can be considered that such a vendor is not, in some sense, in the power of those who deal with him. And whether a sale by auction, under such circumstances, affords fair evidence of the market price. At all events, the question in this cause is of too much importance to be decided incidentally, upon this motion; and I must continue this injunction till the hearing, upon the terms of the plaintiff bringing into court the auction price, together with interest, at five *per cent.*, from the time of payment."

Post obit bonds of a young man put up by him for sale by auction, without reserve, relieved against.

From the cases which have been stated, it appears that hazardous

Where hazardous bargains

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Ireland]; *Or* in case the said [*principal*] should happen to depart this life in the life-time of them the said [*father*]

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with heirs or others are fair, equity will not set them aside.

bargains with heirs or others, to have double or treble the value of the sum lent, after the death of their father, or a tenant for life, or some other contingency, are not always set aside in a court of equity, for they may be fair; and that it is only upon the circumstance of fraud, or being extremely unreasonable, that they can be overthrown. But, that always where they are set aside, though for fraud, the plaintiff must restore to the defendant the money paid, together with interest, according to that maxim in equity, "He that will have equity done to him, must do it to others." Francis's Maxims, I. (7.) [*Gowland* v. *Faria, ante,* 221. *Davis* v. *Duke of Marlborough,* 2 Swanst. 166.] But if the case be fraudulent, and the obligee applies to a court of equity as plaintiff, he will have no assistance, not even to recover what was really lent. For it is a maxim in equity, that "He who hath committed iniquity, shall not have equity." Francis's Maxims, II. 1 Eq. Ca. Abr. 90, (G), (*a*); 276, (*a*). 1 Fonbl. Treat. Equity, 25, 140. The same doctrine prevails in equity, if a contract be infected with an usurious consideration. *Mason* v. *Gardner,* 4 Bro. C. C. 436.* But from the case of *Priestly* v. *Wilkinson,* 1 Ves. jun. 214, the general principle of not extending relief to the lender when he is plaintiff, seems to be rather shaken. There the contract was fraudulent; and it was also unreasonable and unequal, being to pay ten for one, on what had been previously held a colourable contingency. *Vide ante,* 209. Besides, only a small part of the consideration money was really paid, and it was only a verbal contract, principally supported by the plaintiff's own evidence. The facts were these: Priestly filed a bill against the executors of Robert Dennison, praying to have an annuity of 100 guineas, secured to the plaintiff out of the assets of Dennison, or to have the sum of 500 guineas paid to him. It stated that the plaintiff was Dennison's apothecary, and that Dennison, being very low spirited, and *fancying* himself to be in a very bad state of health, told the plaintiff, during one of his visits, that he was sure plaintiff would not insure his life for a year; upon which an agreement took place between them, by which the plaintiff was to pay Dennison ten guineas then—to receive 100 if Dennison should be alive upon the 1st of January, 1784; and plaintiff gave him a promissory note accordingly. Dennison offered to enlarge the agree-

He that will have equity done to him, must do it to others.

He who hath committed iniquity shall not have equity.

Apothecary gave his patient 50 guineas, to receive 500, or an annuity of 100*l.*, if he should survive a year, which he did: bill against executors dismissed, as plaintiff could not succeed at law; but without costs, on ac-

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* [This doctrine also prevails in the courts of common law; see *Roberts* v. *Goff,* 4 B. & A. 92. *Ed.*]

and [*grandfather*] ; *Then* this present obligation to be void ; or else to be and remain in full force and virtue.

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ment to 50 guineas to receive 500, upon the same terms, which was agreed to ; and it was farther agreed, that in case the plaintiff should become entitled to the 500 guineas, that he would take an annuity of 100 guineas instead. Plaintiff offered evidence to prove the consideration of 50 guineas had been paid in this way ; *viz.* the promissory note for 10 guineas—about 30 due to him for medicines, &c. and 10 guineas paid—and that Dennison had said, he had received 50 guineas from the plaintiff. The executors, who proved the will, admitted assets, and offered to pay the bill for medicines, but denied knowing any thing of this agreement, and offered evidence that Dennison had said he had been entrapped into taking 10 guineas, but that he had returned them. Lord Thurlow (without hearing the evidence), said, "It is impossible for me to entertain such a bill as this. He could do nothing upon it at law. If he goes to law, he will lose the whole. But I think the money actually advanced, ought to be paid back ; it is hard and inequitable to refuse that ; for if the bill had been to set this aside, the money actually advanced must have been repaid. But that is the utmost I can do ; for this is not a bargain a man should gain by. Let the bill be dismissed, without costs." *Priestly* v. *Wilkinson*, 1 Ves. jun. 214.

count of the money actually advanced, which must have been repaid upon a bill to set aside the agreement.

If, on the death of the person upon whose decease the money is payable, the transaction is *confirmed*, and if the confirmation be free from the qualifications hereafter stated, then it cannot be set aside ; nor can relief be had, except as to the penalty. *Chesterfield* v. *Janssen*, 2 Ves. 158 ; 1 Atk. 354. For a new agreement may confirm what was at first an unreasonable or a *doubtful bargain*. *Ibid.* *Cole* v. *Gibbons*, 3 P. Wms. 294. [And see the cases quoted, Vol. I. 156.]

Valid confirmation of *post obit*, bars relief on *doubtful* bargain.

The strongest instance of a confirmation of a voidable security, against which the court refused relief, is the following *Anonymous* case, 3 P. Wms. 294, [E.] : A man was caught in bed with another's wife ; and the husband, who caught him, having a sword in his hand, was about to kill the man, who was naked, and in the power of the husband. But upon the man's desiring the husband not to take that advantage of him, and saying that he would make him reparation, thereupon they went into another room, where the man gave the husband a note for 100*l.* payable at a certain time. After which, the money growing due, the husband came for payment, and the man excusing payment, gave his bond for the money, and afterwards brought his bill to be relieved. The Lord Cowper declared, that if the matter had rested on the note, which was gained by a man armed, from one naked,

A husband having caught a man in bed with his wife, the man gave the husband a note for 100*l.* for fear of being killed, and afterwards, when freed from duress, gave a bond for the 100*l.*, equity would not relieve against the bond.

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and by duress, though it happened to be given in satisfaction for the greatest injury, (in which case, however, the utmost remedy the law would have given, had been damages, to be ascertained by a jury,) he should have made no difficulty of granting relief; but when afterwards the plaintiff had coolly, and without any pretence of fear or duress, entered into a bond to the husband, he had thereby himself ascertained the damages, and ought not to be relieved.

But a confirmation of *void* security is inoperative.

However, a new agreement, or bond, after the money becomes due, will not confirm a security which was originally *void*. Therefore if in *Chesterfield* v. *Janssen*, the first bond had been void by the statutes of usury, no new engagement would have made it better: the original vice would have infected it. 2 Ves. 158. See also *Bosanquett* v. *Dashwood*, Cas. temp. Talb. 38. *Jacques* v. *Golightly*, 2 Wm. Bla. 1073. *Cannan* v. *Bryce*, 3 Barnw. and Ald. 185; [*Goodright* v. *Humphreys*, 1 Doug. 52, n.; *Wicks* v. *Gogerly*, 1 Ry. & Moo. N. P. C. 123.]; *post*, 256.

On usurious contract, debtor must pay principal and *legal* interest.

However, the debtor is obliged, in natural justice, to pay the principal and *legal* interest. But for all above legal interest, equity will assist the debtor to retain, if not paid; or an action will lie to recover back the surplus, if the whole has been paid. *Smith* v. *Bromley*, 2 Dougl. 697.

If the party remains poor, or is unapprised of his right to relief, nothing he does will operate in confirmation.

In equity, confirmations of deeds are looked upon with jealousy. 1 Madd. Ch. 122, 2d ed. 1 Fonbl. Treat. Equity, 141, (*r*). Therefore, if the confirmation be not freely given; if the party be poor or distressed, or involved in difficulties, *Crowe* v. *Ballard*, 2 Cox, 257; *Shirley* v. *Martin*, cited 1 Ball & Bea. 358—9; 3 P. Wms. 75; 1 Fonbl. Treat. Equity, 264, (*s*); 11 Ves. 536, 537; 9 Ves. 299; or under an influence of terror or apprehension from the original transaction, or while he considers the bond is valid, or himself under a legal obligation, though the opinion be unfounded; *Crowe* v. *Ballard*, 1 Ves. jun. 220, S. C. 3 Bro. C. C. 120; 2 Cox. 257; or if he is not fully apprized of his right to impeach the security; *Dunbar* v. *Tredennick*, 2 Ball & Bea. 317; *Cann* v. *Cann*, 1 P. Wms. 727; *Roche* v. *O'Brien*, 1 Ball & Bea. 339; and that his act will operate as a confirmation; *Murray* v. *Palmer*, 2 Scho. & Lefr. 486; or if there appears to have been the least fraud or surprise in procuring it, *Cole* v. *Gibbons*, 3 P. Wms. 294;—then, it is not an effectual confirmation. Upon the same principle, in *Curwyn* v. *Milner*, 3 P. Wms. 293, *ante*, 220, the money being paid for fear of an execution, it was not considered as a confirmation; but the defendant was ordered to repay the surplus beyond the principal and interest.

Assignee of a bond takes it subject to all equity; but time and parti-

Whoever takes an assignment of a bond, being a *chose in action*, takes it subject to all the equity in the hands of the original obligee: but length of time, and circumstances, may vary that liability, and make

the case of an assignee for valuable consideration stronger. Therefore if a *post obit* bond be given, and the obligor and obligee die, as well as the person on whose life it was given, and the bond has been assigned, the usual relief will not be granted without proof of imposition. *Hill* v. *Caillovel*, 1 Ves. 122; *ante*, Vol. I. 152. The consideration originally advanced is not stated in the report.

cular circumstances, if there be no proof of imposition, may vary his liability.

BOND *in consideration of a Release of a Debt for paying a Sum* POST OBIT *the Obligor's Uncle, whether the Obligor be or be not then alive: the Sum secured being totally or partially redeemable in the interim.*

POST OBIT CERTAIN, BUT REDEEMABLE.

BOND from [*obligor*] to [*obligee*], in the sum of 30,000*l.*, *ut ante*, 179.

Obligation from one to one.

WHEREAS the above bounden [*obligor*] is (*a*) justly indebted to the above named [*obligee*], upon the settlement of all accounts between them, up to the day of the date of the above written bond, in the sum of 8,230*l.* AND WHEREAS the said [*obligor*], according to the present state and prospect of his circumstances, will not be able to pay and discharge the same sum, until the decease of his uncle, the Right Honourable [ ] Lord [ ]. AND WHEREAS the said [*obligor*] hath proposed to the said [*obligee*], that the said [*obligee*] shall release the said [*obligor*] from the said sum of 8,230*l.*: AND that in consi-

Recital of obligor being indebted to obligee:

that he will not be able to pay the debt till his uncle's death:

that he hath proposed obligee shall release debt, in consideration of ob-

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(*a*) It appears inconsistent to say that the obligor "is indebted," and subsequently to say that he has been released from the debt. Perhaps it would be more correct to say, in the first recital,

Observation on the above recitals.

"WHEREAS the above bounden [*obligor*] was, previously to the execution of the release hereinafter mentioned, justly indebted," &c. "up to the day of the date of the same release, in the sum," &c.

and then make the other recitals in the past tense.

POST OBIT CERTAIN, BUT REDEEMABLE.

deration thereof, the said [*obligor*], his heirs, executors, or administrators, shall and will, within six calendar months next after the decease of the said Lord [ ], pay to the said [*obligee*], his executors, administrators, or assigns, the sum of 16,500*l.*; *but* with such liberty for the said [*obligor*] to buy up such expectant sum, or any part or parts thereof, at any time or times during the life of the said Lord [ ], as hereinafter expressed. AND WHEREAS the said [*obligee*] hath acceded to the said proposal: AND in pursuance thereof, on his part, he hath by a deed poll or writing, bearing (*b*) date the day next before the day of the above written bond, released and discharged the said [*obligor*] of and from the said debt or sum of 8,230*l.*; and all actions, suits, claims, and demands in respect thereof.

ligor, his heirs, &c. paying a sum, *post obit* his uncle; but to be redeemable totally or partially during uncle's life: and that obligee hath acceded thereto, and released the debt.

NOW THEREFORE THE CONDITION of the before written obligation is such, that if the said [*obligor*], his heirs, executors, or administrators, should, within six calendar months next after the decease of the said Lord [ ], well and truly pay, or cause to be paid, the sum of 16,500*l.* of lawful British money unto the said [*obligee*], his executors, administrators, or assigns; OR else if the said [*obligor*] should, at any time or times hereafter, during the life of the said Lord [ ], be minded and desirous to buy up and redeem the said expectant sum of 16,500*l.*, or any part or parts thereof; and should give days notice in writing of such his intention unto the said [*obligee*], his executors, administrators, or assigns, or leave or cause to be left the same at his or their usual or last place of abode; and should, at the end of the days of which such notice shall be given, well and truly pay, or cause to be paid, unto the said [*obligee*], his executors, administrators, or assigns, such sum or sums of

Condition, if obligor, his heirs, &c. should, in six months after uncle's death, pay sum;

or if obligor should previously wish to redeem same, or any part thereof, and should give obligee notice thereof,

and should pay obligee such money as the actuary of the Equitable Assurance Office

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RELEASE AND BOND OF EVEN DATE.

(*b*) If the release bear date the same day as the bond, say, "bearing even date with the above written bond, and executed immediately before the execution hereof released," &c. *ut supra*.

It is not requisite that the release should be dated the day before the bond, although it should be previously executed, because the release is the consideration for the bond.

POST OBIT CERTAIN, BUT REDEEMABLE.

money as the actuary for the time being of the Equitable Assurance Office, at Blackfriars Bridge, London, shall deem a fair and reasonable price or consideration for such total or partial redemption or redemptions, as the case shall be, regard being had to the respective ages of the said [*obligor*] and Lord [ ] at the time or times of such redemption or redemptions respectively; AND ALSO, in the event of any such partial redemption or redemptions as aforesaid, if the said [*obligor*], his heirs, executors, or administrators, should, within six calendar months next after the decease of the said Lord [ ], well and truly pay or cause to be paid unto the said [*obligee*], his executors, administrators, or assigns, so much of the said sum of 16,500*l.* as shall not have been redeemed or bought up in the life time of the said Lord [ ] as aforesaid: *Then*, and in any of the before mentioned cases, of full payment of the said sum of 16,500*l.* after the decease of the said Lord [ ]; or of the redemption or buying up the whole of the same sum during his life; or of a partial redemption thereof during his life, and payment of the residue thereof after his death, in manner aforesaid, the before written bond shall be void and of none effect; or else the same shall be and remain in full force and virtue.

shall fix, for a total or partial redemption;

and, in event of partial redemption, if obligor, his heirs, &c. should, in six months after uncle's death, pay so much of the sum as shall not have been redeemed;

then, in any case of full payment; or of redemption of whole; or of partial redemption, and payment of residue, bond to be void.

MEMORANDUM OF DELIVERING POST OBIT BOND TO DEPOSITARY.

MEMORANDUM *of the Delivery of a* POST OBIT BOND *to a Depositary, to be kept sealed during the Life of the Obligor's Uncle, unless previously Redeemed; in order that the Obligor's Expectations from his Uncle may not be prejudiced.*

Recital of a bond, with recitals and condition.

WHEREAS [*obligor*] of, &c. by his bond or writing obligatory under his hand and seal, bearing even date with these presents, became bound to [*obligee*] of, &c. in the sum of 30,000*l.*; and (*After reciting* that the said [*obligor*] was justly indebted, &c. *And also reciting* that, &c. (*go on to the end of the recitals in the bond*), *The* said bond or writing obligatory is *Conditioned* to be void, if the said [*obligor*], his heirs, &c. should, &c. (*recite the bond, to the word Then.*)

Recital of agreement that bond shall be kept sealed by a depositary, in order that obligor's expectations from his uncle may not be prejudiced.

AND WHEREAS, in order to prevent the said recited bond from being disclosed or made public during the life of the said Lord [ ], to the prejudice of the said [*obligor's*] expectations from him, it hath been agreed, that the same shall be sealed up in an envelope, and be delivered to [*depositary*] of, &c. to be kept by him for the purposes, and under the restrictions hereinafter expressed; and the same hath been accordingly done, as he doth hereby acknowledge.

Declaration by obligor and obligee, that bond has been delivered to depositary, upon trust to keep it sealed up during uncle's life;

NOW THEREFORE the said [*obligor*] and [*obligee*] do hereby testify and declare, that the said in part recited bond, with the condition thereto, hath been so delivered to the said [*depositary*] as aforesaid, *Upon trust*, or to the intent that he, his executors or administrators, do and shall safely (*a*) keep and preserve the same so sealed up, as it hath been delivered

Depositum.

(*a*) *Vide ante*, Vol. I. 2, (*b*). Just. Inst. 3. 15. 3. *De deposito.* D. 16. 3. 1. *Depositi vel contra.* 1 Strahan's Domat, 140, 144, edit. 1722. bk. I. tit. 7. sec. 1 and 3. Wood's Civil Law, 209, 2d ed. bk. I. ch. 2. sec. 3.

to him as aforesaid, during the life of the said Lord [ ]; unless in the mean time the said [*obligor*] should buy up or redeem the said expectant sum thereby secured as aforesaid, pursuant to the power for that purpose given him by the said condition thereto; *And* in that case do and shall deliver up the said bond to the said [*obligor*], to be cancelled: *But* in case the said expectant sum of 16,500*l.*, or any part thereof, should remain unredeemed, or not bought up, at the decease of the said Lord [ ], then do and shall, upon such his decease, deliver the same bond to the said [*obligee*], his executors, administrators, or assigns, for his or their own benefit; but first indorsing thereupon, if a part or parts only of the said sum of 16,500*l.* should have been previously bought up as aforesaid, the sum or sums of money which shall have been so redeemed. WITNESS the hands (*b*) of the said [*obligor*], [*obligee*], and [*depositary*], this day of , 18 .

MEMORANDUM OF DELIVERING POST OBIT BOND TO DEPOSITARY.

or if previously totally redeemed, to deliver bond to obligor to be cancelled.

But if not totally redeemed at uncle's death, to deliver bond to obligee.

first indorsing partial redemptions.

Testimonium.

(*b*) The above instrument does not appear to come within the words "Declaration of any use or trust, uses or trusts, of or concerning any estate or property, real or personal, where made by any writing not being a deed or will; 55 Geo. III. c. 184. Sched. Part I.; and not being under seal and delivered as a deed, a deed stamp is not requisite. *Vide ante,* Vol. II. 588 (d); 401.

Stamp unnecessary.

TO SECURE SUMS TO BE ADVANCED IN ANSWERING DRAFTS, AND TO INDEMNIFY.

BOND *from Two Persons to London Bankers, to pay such Sums as the Bankers shall advance in answering Drafts or Bills to be drawn on them by a Mercantile Firm in the Country, not exceeding a certain Sum;* AND *to indemnify the Bankers from all Losses, &c. on account of accepting and paying such Drafts or Bills.*

Obligation from two to two, or more.

BOND jointly and severally from [*obligor*] of, &c. and [*other obligor*] of, &c. to [*obligees*] of, &c. in the sum of pounds, *ut ante*, 179.

Recital of having opened an account with a firm in the country: and of agreement to accept bills to a certain amount, upon principal and surety giving bond:

WHEREAS (*a*) the above-named [*obligees*] have, at the special instance and request of the above bounden [*obligor*], opened an account with certain persons at the town and county of , using the firm or stile of and company; and have agreed to accept the bills or drafts of the said and company, to be by them drawn upon the said [*obligees*] (*b*), for any sum or sums of money not exceeding in the whole the sum of thousand pounds,

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(*a*) The condition of a bond being larger than the recital, the recital shall restrain it. *Vide post*, 235, (*a*).

FOR ADVANCES AFTER CHANGE IN FIRM.

(*b*) The above form is adapted to the case where the surety intends that his guaranty should only extend to advances to be made by all the obligees. See *Strange* v. *Lee*, 3 East, 484; *post*, 239. But if it be intended that he should be a guarantee for advances to be made by the obligees as well as the survivors, and notwithstanding new partners, then add,

" or the survivors or survivor of them, and other the persons or person who shall or may become partners or partner with them, or any or either of them, in the banking business, or other the firm of the banking house of the said [*obligees*] for the time being, for any sum," &c. *ut supra.*

upon the said [*obligor*], and the above bounden [*other obligor*], entering into a bond, in the penalty above expressed, conditioned as hereinafter mentioned. AND WHEREAS the said [*other obligor*] hath agreed to join with the said [*obligor*] in such bond.

TO SECURE SUMS TO BE ADVANCED IN ANSWERING DRAFTS, AND TO INDEMNIFY.

that one obligor hath agreed to join in bond.

NOW THEREFORE, THE CONDITION of the above written obligation is such, that if the said [*obligor*] and [*other obligor*], or either of them, their, or either of their heirs, executors, or administrators, should, from time to time, and at all times hereafter, in case the said and company should not remit them the said [*obligees*] (*c*) effects in due time, sufficient to answer all the drafts and bills to be drawn upon them (*d*) by the said and company, not exceeding in the whole the sum of thousand pounds, upon request or demand to them, or either of them made, well and truly pay, or cause to be paid unto the said [*obligees*] (*e*), their executors, administrators, or assigns, all such sum or sums of money as shall happen to be advanced by them the said [*obligees*] (*f*), for the said and company,

Condition for payment of sums to be advanced in paying drafts, and for which the merchant's house shall not remit effects; but not to exceed a certain amount:

(*c*) "or the survivors or survivor of them, and other the persons or person who shall or may become partners or partner with them, or any or either of them, in the banking business, or other the firm of the said banking house for the time being, effects," &c. *ut supra.*

FOR ADVANCES AFTER CHANGE IN FIRM.

(*d*) "or any or either of them, or other the firm aforesaid, by," &c. *ut supra.*

(*e*) "or the survivors or survivor of them, and other the persons or person who shall or may become partners or partner with them, or any or either of them, in the banking business, or other the firm of the said banking house for the time being, and their, and each and every of their executors," &c. *ut supra.*

(*f*) "or the survivors or survivor of them, and other the persons or person who shall or may become partners or partner with them, or any or either of them, in the banking business, or other the firm of the said banking house for the time being, for," &c. *ut supra.*

TO SECURE SUMS TO BE ADVANCED IN ANSWERING DRAFTS, AND TO INDEMNIFY.

upon such drafts or bills as aforesaid, and for which no provision shall have been made by them the said and company, (if any such there should happen to be); AND ALSO if the said [*obligor*] and [*other obligor*], or either of them, their, or either of their heirs, executors, or administrators should, from time to time, and at all times hereafter, save, defend, keep harmless and indemnified them the said [*obligees*] (*g*), their heirs, executors, and administrators, and every of them, their, and every of their goods and chattels (*h*), lands and tenements, of, from, and against all losses, costs, charges, damages, and expenses which they the said [*obligees*] (*i*), their heirs, executors, or administrators, shall or may pay, bear, sustain, or be put unto, for or by reason, or on account of any drafts or bills to be by them accepted and paid for the said and company, not exceeding in the whole the sum of thousand pounds as aforesaid, *Then* the above written obligation to be void; otherwise to be and remain in full force and virtue (*k*).

and to indemnify the bankers from all losses, &c. on account of accepting and paying drafts.

FOR ADVANCES AFTER CHANGE IN FIRM.

(*g*) "and the survivors and survivor of them, and other the persons or person who shall or may become partners or partner with them, or any or either of them, in the banking business, or other the firm of the said banking house for the time being, and their, and each and every of their heirs, executors, and administrators, and their, and each and every of their goods," &c. *ut supra.*

(*h*) [Where there was a bond to indemnify, and the obligee paid money which was legally due, though no legal proceedings were instituted against him, it was held that he was damnified within the meaning of the condition. *Ker* v. *Mitchell*, 2 Chit. Cas. temp. Mansf. 487. *Ed.*]

(*i*) "or the survivors or survivor of them, and other the persons or person who shall or may become partners or partner with them, or any or either of them, in the banking business, or other the firm of the said banking house for the time being, or their, any, or either of their heirs," &c.

(*k*) [See two other bonds to bankers, *post*, 446, and 460. *Ed.*]

BY SURETIES, TO PAY SUMS ALREADY OR TO BE ADVANCED.

BOND *from Two Sureties to London Bankers, for Payment of such Sums already, or to be hereafter advanced to Copartners, with Interest, as the Copartners shall not pay: but the Sureties to be only liable to a certain Amount.*

Obligation from two to two, or more.

BOND jointly and severally from [*two obligors*] of, &c. to [*obligees*] of, &c. in the sum of thousand pounds, *ut ante*, 179.

Recital of obligees having, at obligor's re-

WHEREAS (*a*) the above named [*obligees*] have, at the special instance and request of the above bound [*obligors*],

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The condition of a bond being larger than the recital, the recital shall restrain it.

(*a*) The condition of a bond being larger than the recital, the recital shall restrain it. Thus, where in the condition of an obligation, it was recited, that a sheriff had appointed the defendant bailiff of a hundred within his county, "If therefore the defendant shall duly execute all warrants to him directed, that then," &c. it was adjudged, that the words "all warrants" should be intended to be only all warrants which were directed to the defendant *as bailiff of the said hundred*, and not other warrants. *Horton* v. *Day*, cited 2 Saund. 414. S. C. Sty. 18. All. 10. [See also *post*, 304] So where in debt on bond, against a surety, the condition was in these words; "The condition of this obligation is such, that whereas the above named Henry Lord Arlington, postmaster-general to the King's most excellent Majesty, by his sufficient instrument or writing, under his hand and seal, bearing date the thirtieth day of April, 1667, hath deputed the above bound Thomas Jenkins to be his deputy postmaster of the stage of Oxon, in the county of Oxon abovesaid, to execute the said office from the twenty-fourth day of June next coming, *for the term of six months following*; Now, if the said Thomas Jenkins, his deputies, servants, and assigns, do and shall, for and during *all the time* that he the said Thomas Jenkins shall continue deputy postmaster of the said stage, well, truly," &c. It was argued, that the defendant, by the intention of the condition, was not to be responsible

BY SURETIES, TO PAY SUMS ALREADY OR TO BE ADVANCED.

advanced and paid to and to the use of [*partners*] of, &c. merchants and copartners, divers sums of money, by payment of bills of exchange or otherwise; and they the said [*obligees*] have agreed, during their pleasure, at the like request of the said [*obligors*], to pay or advance other monies to, or to the use of the said [*partners*], by payment of such drafts or bills, or otherwise. AND WHEREAS the said [*obligors*], in order to induce the said [*obligees*] to comply with the above mentioned requests, agreed to

quest, paid money for the benefit of copartners;

and during pleasure, at like request, to pay other monies:

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for Jenkins for any longer time than for the six months, although the words are, that Jenkins, during "all the time that he shall continue deputy post-master," &c. *indefinitely*, "shall observe and perform," &c. Yet this time, which is indefinite in itself, ought to be construed only for the six months for which the condition recites that Jenkins was appointed to be deputy post-master, and to which the condition relates: and the rather because Jenkins cannot continue deputy post-master for any longer time than for the six months, unless he be appointed anew, and have a new deputation for a longer time: and that by the construction which the plaintiff's counsel would put upon it, the defendant would be tricked; for it appears that the defendant intended to be bound for Jenkins for the due execution of the office only for six months; but the plaintiff would have the defendant bound during the whole life of Jenkins, which is unreasonable to suppose; and therefore, that the breach ought to have been assigned for non-payment of the monies received within the six months; and it not being so assigned, that the replication was bad and insufficient. And, for the reasons urged by the defendant's counsel, the court held, that the condition shall refer to the recital only, by which the defendant was bound only for six months, and not longer; for the words, "during all the time," shall be intended, but only during the six months recited in the condition. Lord *Arlington* v. *Merricke*, 2 Saund. 411. This has been considered as a leading case upon this subject ever since. As where in debt on bond, conditioned that one W. B. should, during the time he should continue in the service of the plaintiff as a broad-clerk, keep just and true accounts of all monies received and paid, and from time to time pay all monies which he should receive belonging to the plaintiff, into his hands; the defendant pleaded that the plaintiff, at the time the bond was given, carried on the trade of a brewer in his own name only, and the service in the condition mentioned was intended to be executed by the said W. B. to the plaintiff in his trade so carried on by him on his

In general, bonds of suretyship and indemnity do not remain in force after a change has taken place in the firm.

execute such bond or obligation as is above written, with such condition as is hereinafter expressed and contained.

and that, as an inducement thereto, obligors have agreed to execute bond.

NOW THEREFORE THE CONDITION of the above written obligation is such, that if the said [*partners*], some or one of them, their, some, or one of their respective executors or administrators, should not, from time to time, at all times hereafter on demand, well and truly pay, or cause to be paid unto the said [*obligees*], their execu-

Condition, that if partners do not pay sums already, or to be hereafter advanced to them, with interest, then obligors to pay same.

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own account only; and that the plaintiff some time after entered into partnership with another, and that during all the time that the said W. B. continued in the service of the plaintiff alone, he performed the condition of the said bond: the plaintiff replied, that the said W. B. was continued to be broad-clerk after the plaintiff had taken a partner, and that the said W. B. afterwards received 147*l.* 13*s.* on account of the plaintiff and his partner, which sum he had not paid: but on demurrer the court, on the authority of Lord *Arlington* v. *Merricke*, and of *Horton* v. *Day*, held, that the defendant, who was a surety only, ought not to be bound beyond the scope of his engagement, which was to be answerable for the fidelity of the said W. B. to the plaintiff only; and therefore, when he took in a partner, there was an end of the obligation; for, as the condition was confined to the plaintiff only, and the breach assigned was for non-payment of the money to the plaintiff and his partner, it was not within the condition; and gave judgment for the defendant. *Wright* v. *Russel*, 3 Wils. 530. 2 Wm. Bla. 934. S. C. So, where in debt on bond, conditioned, reciting that the defendant was the plaintiff's receiver at Bristol, if, therefore, he did well and truly account for all sums by him received, then the bond to be void; the breach was, that he received so much money, and did not account for it; and because it appeared by the recital in the condition, to be only about transactions of a particular nature, the general assignment of the breach was held ill, on the authority of Lord *Arlington* v. *Merricke*. *African Company* v. *Mason*, cited in *Stibbs* v. *Clough*, 1 Str. 227. So, where in debt on bond, conditioned that one H. (whom the bond recited, the obligee had taken as clerk to him the said obligee) should give a true and just account of, and pay unto the obligee, his executors and administrators, all money which the said H. should from time to time receive for and on account of the said obligee, his executors or administrators; the defendant pleaded performance; the plaintiff replied that the obligee died, and appointed the plaintiffs his executors, who

BY SURETIES, TO PAY SUMS ALREADY OR TO BE ADVANCED.

tors, administrators, or assigns, all and every such sum or sums of money as already have been, or hereafter shall or may be paid or advanced by them the said [*obligees*], to or to the use of the said [*partners*], with lawful interest for the same, from the time, or respective times of such advancement thereof, *Then*, if the said [*obligors*], or either of them, their, or either of their heirs, executors, or administrators, should well and truly pay, or cause to be paid unto them the said [*obligees*], their executors, administra-

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carried on the trade of the obligee after his death, and that the said H. upon the death of the obligee, continued in the service of the plaintiffs as their clerk, and that whilst the said H. continued in their service, he received the sum of 502*l.* belonging to the plaintiffs as executors, which he had not paid. It was adjudged, that the defendant was not liable; for the bond was given to the obligee as an indemnity that the clerk should be faithful to him, and should pay all the money received on his account to him, or to his executors; and it was not the intention of the parties that the bond should be extended beyond the obligee's life; and it was said to be just like the case of Lord *Arlington* v. *Merricke*—*Barker* v. *Parker*, 1 Durnf. and East, 287. But where the security is given to the house, as a banking house for instance, for the fidelity of a clerk *in the shop and counting house*, and not to particular persons, a change of partners is held to make no difference, but the surety still continues liable. As where the condition of a bond, reciting that the plaintiffs had agreed to take one P. J. into their service and employ as a clerk in their shop and counting house, and the obligees had agreed to become security for his fidelity as far as 500*l.* each, declared, that if the said P. J. should faithfully account for and pay to the plaintiffs all sums of money he should at any time receive in the service of the plaintiffs, then the bond to be void. In an action upon this bond a verdict was found for the plaintiffs, upon a case, which stated, that after the bond was given, one R. S. was taken into partnership with the plaintiff, and that afterwards the said P. J. received a sum of money on account of the new partnership, and had not paid over to the plaintiffs. The court thought this case materially distinguishable from the above cited of *Wright* v. *Russel*; for in this case the security was to the house of the plaintiffs, but in that it is only to Wright personally, and the breach assigned was for embezzling the whole partnership money. *Barclay* v. *Lucas*, 1 Durnf. and East, 291, note (*a*). But the authority of *Barclay* v. *Lucas* has been considerably shaken, if not overturned; and the courts

But where the security is for the fidelity of a clerk in the shop and counting house, and not to particular persons, a change of partners has been held to make no difference: *sed qu.*

Promise to three partners to pay for goods

tors, or assigns, such sum and sums of money, and interest as aforesaid, *Then* the above written bond or obligation shall be void and of no effect, but otherwise shall be and remain in full force and virtue.

BY SURETIES, TO PAY SUMS ALREADY OR TO BE ADVANCED.

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have appeared disposed to return to the principles on which *Wright* v. *Russel* was decided, and to hold contracts to be, not with *a house* in trade, but with the individuals carrying it on. Watson on Partnership, 119, 2d ed. [See *Metcalfe* v. *Bruin, post*, 283 and 298.] Thus in *Myers* v. *Edge*, 7 Durnf. and East, 254, it was decided, that a promise in writing, directed to three partners, to pay for goods to be furnished to another, cannot be enforced in an action by two of them, to recover the value of goods furnished after the third had withdrawn from the partnership. So, where a bond was given by A., reciting that B. intended to open a banking account with C. D. and E., as his bankers, the condition of which bond was for payment to them of all sums from time to time advanced to B. at the banking house of C., D., and E.: it was holden, that on C.'s death such obligation ceased, and did not cover future advances made after another partner was taken in; and that B., who was indebted to the house at C.'s death, having afterwards paid off the balance, which was applied at the time to the payment of the old debt incurred in C.'s lifetime, A. was wholly discharged from the obligation: and the court thought this question concluded by the cases of *Arlington* v. *Merricke*, *Wright* v. *Russel*, and *Barker* v. *Parker*. *Strange* v. *Lee*, 3 East, 484. So, where the condition of a bond, reciting that the defendant had agreed with the plaintiffs to collect their revenues from time to time for twelve months, was, that at all times thereafter during the continuance of such his employment, and for so long as he should continue to be employed, he would justly account and obey orders, &c.; it was held, that the obligation was confined to the period of twelve months mentioned in the recital: and Lord *Arlington* v. *Merricke* was relied upon and recognized as a case expressly in point. *Liverpool Waterworks Company* v. *Atkinson*, 6 East, 507. Wms. n. 2 Saund. 414, *a*. (5). So the extent of the condition of an indemnity bond may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate. *Pearsall* v. *Summersett*, 4 Taunt. 593. [And see, as to the general effect of recitals, *Lampon* v. *Corke*, 5 B. & A. 606, and Vol. II. 46.]

A bond was given to the several persons constituting the firm of a banking house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the

to be furnished to a third person, does not extend to goods furnished by two of them when one has withdrawn from the partnership.

Bond for payment to three bankers, partners, of money advanced to a third person, does not cover advances after the death of one partner.

The condition of an indemnity bond may be restrained by the recitals.

Surviving partners, having subsequently received pay-

Proviso that obligors shall only be liable to a certain amount.

PROVIDED *nevertheless*, that the said [*obligors*], or either of them, their, or either of their heirs, executors, or administrators, shall not be liable to answer or pay more than thousand pounds of lawful money of Great

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ments more than sufficient to discharge a debt due on bond, at the death of deceased partner, held that the bond was satisfied.

obligor; one of the partners dies, and a new partner is taken into the firm: at that time a considerable balance is due from the obligor to the firm; advances are afterwards made by the bankers, and payments made to them on account by the obligor; the latter is credited by the new firm with the several payments, and charged with the original debt, and subsequent advances, as constituting items in one entire account, and the balance due at the time of the partner's death is considerably reduced, and that reduced balance, by order of the obligor, is transferred by the bankers to the account of another customer, who, with his assent, is charged with the then debt of the obligor. The person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond: held, that as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions, that they were not at liberty so to treat it at a subsequent period; and that, having received at different payments a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, that the bond was to be considered as paid. *Bodenham* v. *Purchas*, 2 Barnw. and Ald. 39. In which case there is a *quære*, whether the transfer of the balance due from the obligor to the account of another, with his assent, did not, in point of law, operate as a payment. The decision in the last cited case was principally founded on *Clayton's* case, in *Devaynes* v. *Noble*, 1 Meriv. 585, 604 [& *ante*, 184 & 185], where Sir William Grant determined, that creditors who, after D.'s death, continued to deal with the surviving partners, by drawing out and paying in; but having drawn sums out before they paid any in, the balance varying from time to time, but being, upon the whole, *increased* by such subsequent dealings;—the subsequent payments by the surviving partners must be taken in reduction of the balance due at D.'s death; and his estate held discharged, *pro tanto*. [See *Gough* v. *Davies*, 4 Pri. 200. *Simson* v. *Cooke*, 1 Bing. 452, and *post*, 283, and 295.]

The condition may be extended to advances by future partners.

But a bond may be drawn with a condition for the obligor to be answerable not only to the present, but to all future partners in the house. *Strange* v. *Lee*, 3 East, 491.

Indemnity bond for advances to a de-

If a bond be given by a surety as an indemnity for advances to a definite amount, when advances are made to that amount, the guaranty

Britain [and Ireland], upon or by reason or means of the above written obligation.

BY SURETIES, TO PAY SUMS ALREADY OR TO BE ADVANCED.

becomes *functus officio*, and is not a continuing guaranty. Thus a bond entered into by A. and B. to the plaintiffs, to enable A. to carry on his trade, conditioned for the payment of all such sums, not exceeding 3000*l.*, which should at any time thereafter be advanced by the plaintiffs to A., is not a continuing guaranty to the extent of 3000*l.* for advances made at any time, but only a guaranty for advances once made to the extent of 3000*l.* Payments made generally to the plaintiffs on the account of A. may be applied by them in liquidation of a balance existing against A. before the execution of the bond, and B. cannot insist upon their being applied in exoneration of his liability on the bond, although at the time of his entering into it the plaintiffs did not give him notice that any balance was then existing against A. *Kirby* v. *Duke of Marlborough*, 2 Maule and Selw. 18.

finite amount is not a continuing guaranty after advances to that amount are made.

[See *Williams* v. *Rawlinson*, 2 Bing. 76, in which case it was, amongst other things, determined that the proper stamp under the 55 Geo. III. c. 184. for such a bond, is a stamp on the limited sum so secured; as the sum of 3000*l.*, for example, in the case of *Kirby* v. *Duke of Marlborough*; and indeed there could be no doubt on this point. 10 J. B. Moore, 362, S. C.

The legal effect of a bond of indemnity is to protect against the consequences of future deficiencies, but not to entitle the obligee to call for anticipated and precautionary payments upon the principle of a *quia timet*. *Antrobus* v. *Davidson*, 3 Meriv. 569. And see *Phillips* v. *Fordyce*, 2 Chit. Ca. temp. Mansf. 676. *Ed.*]

SURETIES FOR TRADESMAN TO A GIVEN AMOUNT.

BOND *from Two* SURETIES *to Merchants, who have agreed to supply a Tradesman with Goods, conditioned to be void on Payment by Principal; or in case of his Default, on Payment by Sureties, Six Months after Notice, of such Sums not exceeding* 1000*l.* *as shall be due; but, if exceeding* 1000*l.*, *or if no such Notice shall be given, then that Sum.*

Obligation two to five.

BOND from [*two sureties*] (*a*) of, &c. jointly and severally, to [*five obligees*] of, &c. in the sum of 1000*l.*, *ut ante*, 179.

Recital of agreement to supply a tradesman with goods on sureties giving bond.

WHEREAS [*principal*] of, &c. intends to carry on the trade or business of , at aforesaid; and hath applied to and requested the above named [*obligees*] to supply him with goods in the way of his trade; which they have agreed to do, upon the said [*two sureties*] entering into a bond in the penalty above mentioned, and as hereinafter is expressed.

Condition making bond void on payment by principal;

NOW THE CONDITION of the above written bond or obligation is such, that if he the said [*principal*], his heirs, executors, or administrators, or some or one of them, should, from time to time, and at all times hereafter, well and truly pay, or cause to be paid unto the said [*obligees*], their executors, administrators, or assigns, all and every such sum and sums of money as shall at any time or times hereafter become due and owing to them the said [*obli-*

gees] (*b*), from the said [*principal*], for goods which shall or may at any time or times hereafter be sold by them (*b*) to the said [*principal*], and sent and delivered to, or to the order of the said [*principal*], as such sum or sums shall respectively become due and payable; Or in case the said [*principal*], his heirs, executors, or administrators, should, at any time or times hereafter, make default in the payment of any such sum or sums, and the said [*two sureties*], or one of them, their, or one of their heirs, executors, or administrators should, within the space of six calendar months next after notice of any such default, and of the sum then due, shall be given to, or be left at the respective dwellings of them the said [*two sureties*], or of their respective heirs, executors, or administrators, by them the said [*obligees*], or any of them, their, or any of their executors or administrators, well and truly pay, or cause to be paid unto the said [*obligees*], their executors, administrators, or assigns, all and every such sum and sums of money as at the time of such notice shall be due and owing from the said [*principal*], his heirs, executors, or administrators, unto the said [*obligees*], their executors, administrators, or assigns, in case the same should not exceed the sum of one thousand pounds sterling; *but* if the same should exceed the sum of one thousand pounds sterling, then the sum of one thousand pounds, in part of such sum or sums then due and owing, as last aforesaid; Or if no such notice as aforesaid should be given or left as aforesaid, *Then*, in any of the said cases, the above written bond or obligation shall be void, and of no effect; otherwise shall be and remain in full force and virtue.

SURETIES FOR TRADESMAN TO A GIVEN AMOUNT.

or in case of his default, on payment by sureties, six months after notice, of such sums, not exceeding 1000*l.* as shall be due; but if exceeding 1000*l.*, then that sum;

or if no such notice shall be given.

(*b*) If it be intended to extend the security to sums to become due after an alteration in the firm, *vide ante*, 232.

EXTENDED TO NEW FIRM.

ATTORNEY AND SURETIES TO LONDON AGENT.

BOND *from an* ATTORNEY *in the Country and* TWO SURETIES, *to his* AGENT *in London, for securing Money due, and to become due on account.*

BOND from [*principal*] of, &c. [*surety*] of, &c. and [*other surety*] of, &c. to [*agent*] of, &c. in the penalty of 10,000*l.* *ut ante*, 179.

WHEREAS the above named [*obligee*] hath for some time past acted as the agent in London of the above bounden [*principal*], in his business of an attorney and solicitor: *And* the said [*principal*] is now indebted to the said [*obligee*] in a considerable sum of money on such account: *And* the said [*principal*] hath applied to the said [*obligee*] to continue to act as such agent, which he the said [*obligee*] hath consented and agreed to do upon having a bond from the said [*principal*], with sufficient sureties, for the repayment of the money already due, and which may hereafter become due from the said [*principal*] to the said [*obligee*] (*a*). AND WHEREAS the above bounden [*surety*] and [*other surety*] have, on the applica-

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TO A LIMITED EXTENT.

(*a*) If limited not to exceed a given sum, add,

"As hereinafter mentioned."

Stamp.

For, if the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain, and without any limit, the stamp must be 25*l.* But where limited not to exceed a given sum, the same duty as on a bond for such limited sum. 55 Geo. III. c. 184, Sched. Part I. title BOND.

Where the sum to be secured is unlimited, it seems the penalty is the limit as to the stamp duty.

But it seems clear, that in the absence of an express limitation, the penalty is the limit; and therefore in such a case, the duty should be paid on the penalty. *Vide ante*, 199, 200. In that point of view it may appear unnecessary to limit the amount expressly. [See *ante*, 241. *Ed.* n.]

tion of the said [*principal*], agreed to enter into the above written bond or obligation as such sureties.

ATTORNEY AND SURETIES TO LONDON AGENT.

NOW THE CONDITION of the above written bond or obligation is such, that if the above bounden [*principal and sureties*], their heirs, executors, or administrators, or some or one of them should, from time to time, and at all times hereafter, well and truly pay or cause to be paid unto the said [*obligee*], his executors, administrators, or assigns, all such sum and sums of money as are now due and owing from the said [*principal*] to the said [*obligee*], as such agent as aforesaid; *And also* all such further sum and sums of money as may at any time or times hereafter become due from the said [*principal*] to the said [*obligee*], as such agent as aforesaid, when and so often as they the said [*principal and sureties*], or any of them, their, or any of their heirs, executors, or administrators, shall be required so to do by the said [*obligees*], his executors, administrators, or assigns (*b*); *Then* the above written bond or obligation shall be void and of no effect; otherwise shall be and remain in full force and virtue.

(*b*) Limit the extent, *ut ante*, 240, if it be the intention.

LIMITED EXTENT.

TO TRANSFER STOCK AFTER NOTICE, AND PAY DIVIDENDS IN MEAN TIME.

BOND *for Purchasing and Transferring* (*a*) *Navy Five per Cent. Bank Annuities, after Six Months' Notice, being the Amount of Stock sold for the Obligor's Benefit; and for Paying the Amount of the Dividends in the mean Time.*

Obligation one to one.

BOND from [*obligor*] of, &c. to [*obligee*] of, &c. in the sum of 2000*l.*, *ut ante*, 179.

Condition for purchasing and transferring

THE CONDITION of the above-written bond or obligation if such, that if the above bounden [*obligor*],

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(*a*) ON THE LOAN, AND AGREEMENT TO RE-TRANSFER STOCK, AND TO PURCHASE AND TRANSFER STOCK, AT A FUTURE DAY.

I. *As connected with the Law relating to* Usury.

II. *As connected with the* Stock-jobbing Act.

1*st*. *That part of the act relative to contracts for transferring stock of which the party is not possessed.*

2*d*. *That part of the act relative to paying differences.*

III. *As to the measure of* damages, *in case the stock be not transferred on the day appointed, and the lender has recourse to an action at law, or suit in equity.*

IV. *As to proof of a debt for not transferring stock, in case the borrower becomes* bankrupt.

I. The temporary transfer of stock in the public funds is an engine of usury not unfrequently resorted to.

The mere loan of stock is not usurious, nor the payment of the dividends in the mean time, even though they exceed the legal rate of interest.

The cases on this point are not in perfect harmony. However, it seems agreed, that the mere loan of stock is not usurious, nor the payment of the dividends in the mean time, even though they exceed the legal rate of interest. Per Lord Kenyon, in *Tate* v. *Wellings*, 3 Durnf. and East, 547; but that usury can only attach to the proceeding, where the party *transferring* receives, or is likely to receive, more than the legal rate, and cannot by possibility receive less. Comyn on Usury, 104.

his heirs, executors, or administrators, or any of them, should (*b*), at any time within six calendar months after notice in writing for that purpose from the above named

navy five per cent. bank annuities, after six months' notice.

The earliest case on the subject is *Moore* v. *Battie*, Amb. 371; S. C. 1 Eden, 273; where the defendant, Dr. Battie, lent the plaintiff several sums of money upon mortgage; and the plaintiff, having occasion for more, the defendant advanced him 1000*l.* in the following manner: by selling out 1000*l.* South Sea annuities, which, at that time, were under par, and sold at a loss of 76*l.* upon the whole, and paying him 924*l.*, the money for which they sold, took a mortgage for the whole 1000*l.* at 5*l.* per cent. interest, with covenant to reduce the interest to 4*l.* per cent. if paid within one year. He afterwards advanced the plaintiff 1400*l.* more, in the same manner, by sale of so much South Sea annuities, which were then also under par, and being sold at the loss of 267*l.* 15*s.* upon the whole. The sum paid to the plaintiff was 1132*l.* 5*s.* The mortgage was for 1400*l.* at 5*l.* per cent. interest, with a power for Moore to reinstate the 1400*l.* South Sea annuities at any time within two years, which was not done. A bill was brought by the defendant to foreclose; and Moore, in his answer, admitted the mortgages, and submitted in general to pay what was due. The master, in taking the account, considered those sums as 1000*l.* and 1400*l.*, and computed interest upon them accordingly. The plaintiff paid the principal, interest, and costs, and then brought this bill, *inter alia*, to be paid the several sums of 76*l.* and 267*l.* 15*s.*, and interest; insisting that he ought not to have been charged with them in the account. The defendant pleaded the proceedings under the decree, in bar; and two

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(*b*) If the stock is to be replaced on a certain day, say,

ON A CERTAIN DAY.

"on or before the day of now next, purchase and transfer," &c. *ut supra*.

If the stock is to be replaced on a certain day, and default is made, the obligee may recover the value of the stock on the day appointed for replacing it, or on the day of trial, at his option. *Vide post*, 259. And if default is made in paying the dividends, or replacing the stock, the value of the stock may be proved under the commission, if the borrower becomes bankrupt. But, if the stock is to be replaced after notice, and the obligor becomes bankrupt before notice, without having failed in paying the dividends, the value of the stock cannot be proved under the commission. *Vide post*, 261-2; and Mr. Shadwell's opinion, *post*, 271.

TO TRANSFER STOCK AFTER NOTICE, AND PAY DIVIDENDS IN MEAN TIME.

[*obligee*], his executors, administrators, or assigns, to be delivered to the said [*obligor*], his heirs, executors, administrators, or assigns, or to be delivered and left for him or

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questions being raised; first, whether the transaction was usurious? and secondly, whether, the money having been paid, equity would relieve? Sir Robert Henley, Lord Keeper, said, "As to the first, I am clear of opinion it is a shift within the statute of usury. The plaintiff had but 924*l.* instead of 1000*l.* in the one case, and 1132*l.* 5*s.* instead of 1400*l.* in the other. He has paid as much interest as is equal to 5*l.* per cent. for 1000*l.* and 1400*l.*, which is more than the statute allows, being more than 5*l.* per cent. for the money he received. Suppose stocks at 75*l.* per cent.; if a person takes at par, he pays 6*l.* 5*s.* per cent. The case of the 1400*l.* is not distinguishable from the other. Not so on the footing of a risk: for the defendant took interest for 1400*l.*, though, in fact, the plaintiff received but 1132*l.* 5*s.* As to the second point, equity will relieve after the money is paid; the law can not. This matter was not in question in the former cause. The plaintiff might indeed have brought a cross bill, but he did not; there has, therefore, been no determination on this question. He complains of being injured in the account." His Lordship, therefore, decreed payment. In confirmation of the second point, see *Bosanquet* v. *Dashwood*, Cases temp. Talb. 38; *Proof* v. *Hines*, Ibid. 114; *Barker* v. *Vansommer*, 1 Bro. C. C. 149; *Brown* v. *Barkham*, 1 P. Wms. 652.

Where illegal interest has been actually paid, equity will, on the prayer of the oppressed party, order repayment.

But as to the first point of the above case, independently of any consideration of the power which was given to the borrower of replacing the stock, and so of defeating the excess of interest, it appears that the lender was *subject to some loss*, whether the stock were replaced within two years or not. For, if the stocks fell within two years, it might have been replaced for less money than it had been sold for; if they rose after the two years had expired, the money paid to him would not have enabled him to purchase as much stock as he originally had.

If this be so, it will be difficult to reconcile this case with the cases of *Tate* v. *Wellings*, and *Pike* v. *Ledwell*, which have subsequently been decided.

It has been held, that the lender may stipulate for the retransfer of stock at a given day, and in default of transfer, then for payment of the

The first of these was an action on a bond, in the penalty of 1550*l.* 6*s.* to which the defendant pleaded usury. And it appeared in the evidence, that the defendant had applied to Wellings (to whom the plaintiff was executor), to advance him a sum of money; which the testator consented to do, upon the defendant's promising to him the same interest that he received in the short annuities, viz. eight and a half per cent.; it was therefore settled that the money should be raised by the

them at , purchase and transfer, or cause to be purchased and transferred, unto and into the name or names of the said [*obligee*], his executors, administrators, TO TRANSFER STOCK AFTER NOTICE, AND PAY DIVIDENDS IN MEAN TIME.

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sale of short annuities, to the amount of 912*l.* 12*s.* 6*d.*, which the defendant was to replace in the same stock by the 1st of September, 1785; but if it were not replaced by that time, he was then to repay the 912*l.* 12*s.* 6*d.* on the 1st of January, 1786, and in the mean time to pay such interest as the stock would have produced. There was no actual transfer of the short annuities to the defendant himself; but the stock was really sold to some other person, and the defendant received the produce of it the same day. Lord Kenyon left it to the jury to consider whether this was intended as a *bonâ fide* loan of stock, or as a loan of money, and the present device a mere colour for receiving more than legal interest: they found that it was a fair and honest loan of stock, and gave the plaintiff a verdict. A rule for a new trial was obtained; upon shewing cause against which it was urged, that the defendant, having it in his power to replace the stock any time before September, 1785, during which interval the testator ran the risk of the stocks falling, and the defendant's replacing it upon such a fall; and that the testator was only to receive what he would have received in case he had not sold his stock. In support of the rule, it was contended, that though a contract for the loan of stock, to be replaced in stock at all events, be legal, yet, as there was an alternative to replace it on a given day, or to repay it in money, with more than lawful interest, it was usury. The court, however, thought otherwise; and, as the jury had negatived the colour for usury, they thought themselves bound to consider it a fair transaction, and accordingly discharged the rule. *Tate* v. *Wellings*, 3 Durnf. and East, 531. Lord Kenyon thought, that as the transaction was legal during the first year, there was nothing superadded to make it usurious. Mr. Justice Ashhurst thought, that from the contract the creditor derived no advantage, for he was only to receive in the mean time the same interest which the stock would have produced: and Mr. Justice Buller said, this was not like the case cited from Cro. Jac. [507, *Roberts* v. *Trenayne*,] where the principal was always secure; for here the testator might have been a loser in the event of the stock rising after the first year. Mr. Coote says, "on consideration of the foregoing case, it is respectfully submitted, that the opinion given by Lord Kenyon, viz. that there was nothing superadded after the first year to make the transaction usurious, appears singular, considering that it was an agreement to repay *a sum* money produced by the sale, and reserve a rate of interest equal to the dividends.

TO TRANSFER STOCK AFTER NOTICE, AND PAY DIVIDENDS IN MEAN TIME.

or assigns, the sum of one thousand pounds, five per cent. bank annuities, in the fund commonly called navy five per cent. bank annuities, (being the amount of five per cent.

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of money with eight and a half per cent. interest. The reason given by Mr. Justice Ashhurst is yet more remarkable; for it would seem to imply, that an agreement to repay money raised by the sale of stock, would not be usurious, if the rate of interest did not exceed the dividends of the stock sold. The reasoning of Mr. Justice Buller, namely, that the lender ran the hazard that the stock might rise after the first year, would apparently apply to any loan of money raised by the sale of stock. The lender cannot be advised to rely on the case of *Tate* v. *Wellings* as an authority for the proposition, that he may stipulate for the re-transfer of stock at a given day, and in default of transfer, then for the payment of the amount of the money produced by the sale, and reserve a rate of interest equal to the dividends." Coote on Mortgage, 307. However, the cases hereafter cited, appear to support the principle of the case of *Tate* v. *Wellings*. See the observations of the court in *Maddock* v. *Rumball*, 8 East, 307; *post*, 252. It is in point of fact only contracting for what the court has decreed. *Forrest* v. *Elwes*, *post*, 260. It is only fixing the value at which the stock is to be taken, instead of giving the obligee the advantage of recovering damages at his election, either according to the value on the day it is to be replaced, or on the day of trial. *Vide post*, 259.

An agreement for the purchase of stock, to be transferred at a future day, at a price below the then value, is not usurious.

The case of *Pike* v. *Ledwell*, and *Ann Monprivatt*, 5 Esp. N. P. C. 164, was an action of debt on bond. The defendant having first craved oyer of the bond, which recited, that one Richard Monprivatt the elder, by his will bequeathed (*inter alia*) 400*l.* in the three per cent. consols to his wife, Ann Monprivatt, (one of the defendants) her heirs and assigns, provided that she continued sole and unmarried, but in case she married again, then he bequeathed the same to his son, Richard Monprivatt, and his daughter, share and share alike; and in case either his son or daughter should happen to depart this life before the event of his wife marrying, the whole to go to the survivor or survivors on their attaining the age of twenty-one years, or marriage; and reciting, that the daughter had departed this life; and that the said Richard Monprivatt the younger would be entitled to the said 400*l.* stock in case of his mother's marriage, or his attaining the age of twenty-one years; and that his said mother was desirous of advancing her son, and had agreed to sell and dispose of the sum of 400*l.* stock to Josiah Pike (the plaintiff) for 160*l.* to be transferred to the said Josiah Pike, when her said son should arrive at the age of twenty-one years: the recital

bank annuities, which the said [*obligee*] hath sold and disposed of, at the instance and request, and for the accommodation of the said [*obligor*], and applied the pro- (being amount of stock sold for obligor's benefit);

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then stated the sale. The condition of the bond was, that if Ann Monprivatt and Richard Monprivatt should, within seven days after the 11th day of February, 1804, on which day he would be of age, well and truly transfer the said 400*l.* stock, or pay to Pike the value of 400*l.* consolidated Bank of England stock, on the said last mentioned day, then the obligation to be void. The defendants then pleaded, first *non est factum;* and, secondly, that the contract was usurious. It was proved that the value of the 400*l.* stock, when the agreement was made, was 240*l.*, and at the time of the action brought, 225*l.* It was contended that this was usury; for, as the stock was worth 240*l.* and the plaintiff had only paid 160*l.*, he had gained 80*l.* by his bargain, and the dividends in the mean time [the dividends are not mentioned in the bond]; that it might be said there was a contingency, because the three per cents might fall to twenty or thirty per cent.; but that this was an impossible supposition. But Lord Ellenborough said, that, whatever remedy the defendant might have in equity, on the ground of this being a catching bargain, he had none at law; contingency in the thing purchased was incompatible with the idea of usury, in which the principal must always be certain. It was admitted, that if the stock, when transferred to the plaintiff, would be worth but 160*l.*, it would not be usury; that the stock would suffer that most extraordinary depreciation, was very improbable, but still it was within the reach of possibility. He therefore could not say that there was not some contingency in the transaction, and he was consequently of opinion, that the contract was not usurious. *Pike* v. *Ledwell,* 5 Esp. N. P. C. 164. In this case, the doctrine of contingency is carried farther than it has ever before been carried; and an accident, barely within the verge of possibility, is made as effective as one that may probably occur. In *Chesterfield* v. *Janssen,* Mr. Justice Burnett observed, that the *slightness* or *reality* of the risk seems to be the only rule directing the judgment of the court; and that if a bond were payable, in case one out of twenty ships, bound from Newcastle to London, arrived safe, that would be a contingency for which the statute would be too hard: so, if a contract were made, if the packet should return to Dover from Calais, at a season of the year in which there is no danger. 2 Ves. 143. And surely the loss of twenty ships between Newcastle and London, or the loss of the packet between Dover and Calais, in fair weather, would be a matter of less surprise than the fall of the stocks to 20 or 30 per cent.

An accident barely within the verge of possibility, has been made as effective as one that may probably occur.

for paying the amount of dividends in the mean time;

duce for his benefit, and under his direction;) *And* if, in the mean time, and until such transfer shall be made, the said [*obligor*], his heirs, executors, or administrators, or

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See *Clayton's* case, 5 Co. 70, b. S. C. *Reynolds* v. *Clayton*, 2 And. 15; Moore, 397. But, whether or no this be too great an extension of the principle, the principle itself will remain unimpaired.

It is also to be observed, that Mr. Justice Ashhurst, in describing the transaction in *Tate* v. *Wellings*, 3 Durnf. and East, 538, used these words: "The agreement was, that the defendant should have the use of the money, which was the produce of the stock, paying the same interest which the stock would have produced, with liberty to replace the stock on a certain day, till which time the lender was to run the risk of the fall of the stocks; but he stipulated, that if it were not replaced by that time, he would not run that risk any longer, but would be repaid the sum advanced at all events. And, from this contract, he derived no advantage; for he was only to receive in the mean time the same interest which the stock would have produced."

Now in the case of *Moore* v. *Battie*, a similar risk was to be encountered, with this difference; that, in the one case, the money to be repaid was the money *actually received*; whereas, in the other, it was only the nominal value. But this will not necessarily be an advantage to the lender; because stock may be, and frequently is, above its nominal value; so that it seems indifferent which of the two sums is taken. It will not, therefore, be too much to suppose, that *Moore* v. *Battie*, is overruled by *Tate* v. *Wellings*. This is Mr. Comyn's conclusion, and it seems to be the correct conclusion. Comyn on Usury, 112.

Agreement to transfer so much stock on a future day, as a debt would purchase at the present day's price, and such interest as the same would have produced as stock in the mean time, is not usurious.

In another case, the plaintiff declared upon a bond, dated the 19th of November, 1803, for 972*l.* 9*s.*; and, upon a plea of usury, it appeared, that the defendant had been indebted to the plaintiff in 486*l.* 4*s.* 6*d.* for which the plaintiff had sued him; but being unable to pay it, he agreed, that in consideration the plaintiff would forbear his action till the 19th of November, 1804, upon the defendant's giving him a bond to transfer to the plaintiff, on the 19th of November, 1804, so much stock as 486*l.* 4*s.* 6*d.* would purchase at the then present day's price, which would amount to 908*l.* 16*s.* 7*d.*, *together with such interest as the same would have produced as such stock* in the mean time. Lord Ellenborough, having left it to the jury to say whether this were a fair transaction, or a mere colour for usury, they found for the plaintiff. And, on a motion for a new trial, "All the court agreed, that this was not usury; as the amount of the sum to be paid by the defendant depended upon a contingency: and, if the stocks had fallen in the mean time to 50*l.*, the plaintiff might have received less than the principal and inter-

any of them, should, half yearly, on the days appointed for payment of dividends on the said navy five per cent. annuities; that is to say; on the day of , TO TRANSFER STOCK AFTER NOTICE, AND PAY DIVIDENDS IN MEAN TIME.

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est would have amounted to. That this was no more usury than an agreement to replace stock lent; which, though once contended to be usury, if more than the principal and *legal* interest were thereby obtained, had been long settled to be legal. If, indeed, this had been a mere colour for usury, it would not have availed; but that was negatived by the jury, and nothing appeared to impeach the fairness of the transaction." *Maddock* v. *Rumball*, 8 East, 304, in the year 1807.

Agreement to repay a debt, or at creditor's option, to transfer so much stock as debt would purchase on a given day, is usurious.

But where there was a contract for the repayment of a debt, *or at the option of the creditor*, to transfer so much stock as the amount of the debt would have produced on the day it was payable, Sir William Grant, Master of the Rolls, held this to be usury. For, the principal and interest *being secured*, the creditor might take the opportunity of a rise in the stocks to make his election; and by electing to have it transferred at such a rise, he would be sure to be a gainer, while it was impossible that he could ever sustain any loss. *Barnard* v. *Young*, 17 Ves. 44. [And *acc. White* v. *Wright*, 3 B. & C. 272, and 5 Dow. & Ry. 110. S. C.]

Result of the cases as to contracts to replace stock at a future day, according to the then state of the market.

With regard, therefore, to contracts to replace stock at a *future* day, *according to the then state of the market*; it is clear, that if the lender be not certain whether, by the stock's being replaced at a given day, he shall be a loser or gainer, any gain which he may obtain by the replacing, will not taint the agreement with usury; but if, on the other hand, he has so made the agreement that he is secure from loss, and has a chance of gain, this, by taking away the contingency, deprives the transaction of its legality.

If the exact value of the stock to be sold or replaced has been previously estimated by the parties, so that all is certainty, and nothing contingent, the transaction will be usurious.

And where the exact value of the stock to be sold or replaced has been previously estimated by the parties, so that all is certain, and nothing contingent, the transaction will be usurious. Thus, in an ejectment to recover possession of mortgaged premises, it appeared, that the mortgage was made upon a selling of stock. The mortgagor had applied for money to the mortgagee, who told him that all his money was in the funds, and that to sell out stock at that time would be a considerable loss, stock then standing at 73; but that if he would take it at 75, he should have the sum he wanted. The mortgagee consented to this, and received 1500*l.* in stock valued at 75; this he sold the same day, when the current price of stock was 72¾, by which he lost between 50*l.* and 60*l.* Upon proof of these facts, Lord Kenyon held the transaction usurious, and nonsuited the plaintiff. *Doe* dem. *Davidson* v. *Barnard*, 1 Esp. N. P. C. 11.

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and the day of in each year, well and truly answer and pay to the said [*obligee*], his executors, administrators, or assigns, such sum or sums of money as

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So, in *Boldero* and another v. *Jackson*, 11 East, 612, where the plaintiffs had made advances to the defendant, and credited them with 25,000*l.* at a time when the 3 per cents. were at 50; in consideration of which, afterwards, in October, when the 3 per cents. were at 51¼, he undertook to purchase 50,000*l.* stock in their names, and to account for the dividends thereon from Midsummer day then last, it was allowed on all hands that this was usury.

Continuation contracts are, it seems, usurious.

So, it seems, what are called *continuation contracts*, are usurious. Thus, one Pidding being indebted to Roberts and another, who were stock brokers, to the amount of 8,237*l.* 10*s.*, they proposed to him to continue the loan of this money till the 10th of January following, on his pledging 10,000*l.* omnium with them, on which they were to advance an instalment of 1,000*l.* on the 15th of December, and which they were to return on the 10th of January, at three eighths higher than the price on the 15th of December. He agreed to the proposal, and it was carried into effect. He accordingly, on the 10th of January, upon his receiving back his script receipts for the 10,000*l.* omnium, gave them a cheque for 9,275*l.* which was duly paid. This total was composed of 8,237*l.* 10*s.*, the original debt; the 1,000*l.* instalment; and 37*l.* 10*s.* for the three-eighths; which last sum is more than at the rate of 5*l.* per cent. per annum for the money forborne. The credit of Pidding was, however, somewhat shaken upon cross-examination, and no very satisfactory account was given of the nature of a continuation contract. Lord Ellenborough said, that, as far as could be discerned from the evidence, there was no contingency in the transaction; and whether the market rose or fell, the lender must have recovered his principal, together with the advance upon the price of the omnium. If so, where that advance is above the legal rate of interest, the transaction is undoubtedly usurious; and, in this case, if the jury believed the witness, they must find for the plaintiff. His Lordship then pointed out some improbabilities in Pidding's testimony; and the jury found for the defendants. *Smadley, qui tam* v. *Roberts* and another, 2 Camp. 607.

[On a contract for retransfer of stock and payment of dividends, a party cannot bargain *ab ante*, for interest, on dividends remaining unpaid. *Downes* v. *Glagebrook*, 3 Mer. 207. On a loan of stock, with an agreement to replace it by instalments, and after one had been transferred and a second had became due, it was agreed that it should

shall be equal to the sum or sums of money which he or they would have been entitled to receive on and for the said sum of one thousand pounds five per cent. bank annui-

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be converted into a money loan for the amount at the price of the stock when lent, which was higher than the existing price, and a further time should be given for the forbearance; such agreement, as to the stock due, was held to be usurious, as the additional amount was for forbearance, but as to the stock not due, there was a difference, by reason of the uncertainty of the price of stock before it became due. *Ramsbottom* v. *Parker*, 6 Madd. 6. 2 B. & C. 257. S. C. It should be observed that the point arose incidentally in equity. *Ed.*]

500*l.* penalty on buying or selling stock, of which they are not actually possessed at the time of the contract.

II. 1st. It was formerly doubted whether a loan of stock was lawful; or whether it was not prohibited by the 7th Geo. II. c. 8. s. 8, which is as follows: "Whereas it is a frequent and mischievous practice for persons to sell and dispose of stocks, or other securities, of which they are not possessed: Be it therefore further enacted, by the authority aforesaid, that all contracts and agreements whatsoever, which shall, from and after the said first day of June, one thousand seven hundred and thirty-four, be made or entered into for the buying, selling, assigning, or transferring of any public or joint stock or stocks, or other public securities whatsoever, or of any part, share, or interest therein, whereof the person or persons contracting or agreeing, or on whose behalf the contract or agreement shall be made to sell, assign, and tranfer the same, shall not, at the time of making such contract or agreement be actually possessed of, or intitled unto, in his, her, their own right, or in his, her, or their own name or names, or in the name or names of a trustee or trustees, to their use, shall be null and void to all intents and purposes whatsoever; and all and every person and persons whatsoever, contracting or agreeing, or on whose behalf, and with whose consent, any contract or agreement shall be made, to sell, assign, or transfer any public or joint stock or stocks, or other public securities, whereof such person or persons shall not, at the time of making such contract or agreement, be actually possessed of, or entitled unto, in his, her, or their own name or names, or in the name or names of a trustee or trustees, to their use, or their own right, as aforesaid, shall forfeit and pay the sum of five hundred pounds, to be recovered by action of debt, bill, plaint, or information, in any of his Majesty's courts of record at Westminster, in which no essoin, privilege, protection, or wager of law, or more than one imparlance, shall be allowed; one moiety thereof to the use of his Majesty, his heirs and successors; and the other moiety thereof to the use of him,

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ties, if, and in case the same had been not purchased and transferred, or had continued in his or their name or names, (being the same sum of one thousand pounds five

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100*l.* penalty on brokers' agents negociating such contracts.

her, or them who shall sue for the same: and all and every broker or brokers, agent or agents, who shall negociate, transact, or intermeddle in the making, or procuring to be made, any such contract or agreement as aforesaid, and shall know that the person or persons, by whom or on whose behalf such contract or agreement shall be made, is or are not possessed of, or intitled unto, the stock or security, concerning which such contract or agreement shall be made in his, her, or their own name or names, or in the name or names of a trustee or trustees for their use or right, shall, for every such offence, forfeit and pay the sum of one hundred pounds, to be recovered by action of debt, bill, plaint, or information, in any of his Majesty's courts of record at Westminster, in which no essoin, privilege, protection, or wager of law, or more than one imparlance, shall be allowed; one moiety thereof to the use of his Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them who shall sue for the same."

[The words "*public or joint stock,*" in this act, relate solely to the stock of this country, the act being made to prevent jobbing in the British funds: a trafficking, therefore, in those of other countries, is not affected by the act. *Henderson* v. *Bise*, 3 Stark. 156. *Ed.*]

A loan of stock to be replaced on a given day, is not within the stock-jobbing act.

The question was first tried in 1799, in an action of assumpsit, before Lord Kenyon, when a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench. The circumstances were, the plaintiff, Sanders, who was a clergyman, lent the defendant, Kentish, who was a stockjobber, 3000*l.* four per cent. annuities; the defendant Hawksley, was a surety with Kentish for the retransfer. The defence set up to the action by the defendants was, that the loan was within the prohibition of the 7 Geo. II. cap. 8. It was answered, that the transaction was within the saving of the 11th section; namely, "That nothing in this act contained shall extend, or be construed to extend, to hinder or prevent any person or persons from lending any sum or sums of money on any public or joint stock, or other public securities whatsoever, or any part, share, or interest therein, or to prevent or hinder any defeazance, contract, or agreement, being made and entered into for the redelivering, assigning, or transferring such public or joint stock, or other public securities, or any part, share, or interest therein, upon the repayment of the sum or sums of money which shall have been lent and borrowed thereupon, with interest for the same, so as no premium or other consideration whatsoever be paid

per cent. bank annuities, and the amount of the dividends thereon, as are further secured to the said [*obligee*], his executors, administrators, or assigns, by the provisions of

(reference to collateral security;)

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to or received by the person or persons lending such money, for or in consideration of such loan, more than legal interest." In this opinion the court coincided. Lord Kenyon reprobated strongly the conduct of the defendant Kentish, he being a stock-jobber, and therefore acquainted with the statute; and he remarked, the intention of the legislature is to be collected from the whole act taken together. The act is intituled, "An act to prevent the infamous practice of stock-jobbing;" but if the defendant's objections are to prevail, the title of the act ought to be altered, and it should run thus: "An act to encourage the wickedness of stock-jobbers, and to give them the exclusive privilege of cheating the rest of mankind." *Sanders* v. *Kentish*, 8 Durnf. and East, 162.

Agreement to transfer so much stock on a future day, as a debt would purchase at the present day's price, and such interest as same would have produced as stock in the mean time, is not within the stock-jobbing act.

And in the above mentioned case of *Maddock* v. *Rumball*, 8 East, 304, it was contended, that it was a transaction within the prohibition of the stock-jobbing act, 7 Geo. II. c. 8. But *per curiam*, "This was in effect a loan of stock. The plaintiff would have purchased stock at the price it stood at on the 19th November, 1803, if he had received his debt then: but he was content to take his debt in stock, to the same amount, at a future day: that is the case with every contract for the replacing of stock. The intention of the parties to a loan of stock is, that it should be sold, and the same quantity of stock repurchased at a future period by the borrower." The rule was refused; whereby the court held, that it was not within the stock-jobbing act.

In equity, agreement to transfer stock within a given time is not usurious, nor within the stock-jobbing act.

So in *Clark* v. *Giraud*, 1 Madd. Rep. 511, where C. being indebted to G. in 1000*l.*, agreed to transfer, within a given time, 100*l.* per annum, long annuities, at the then price, and in the mean time pay G. the dividends; and that the debt of 1000*l.* should constitute part of the purchase-money. The stock was not purchased at the time, and there was a rise in the price of the stocks. Sir Thomas Plumer, Vice-Chancellor, held that the agreement was not usurious, nor within the stock-jobbing act; and a motion for an injunction was refused.

Stock, or money lent for the purpose of paying losses incurred in illegal stock-jobbing, and so applied by the borrower, cannot be recovered by the lender, al-

II. 2. But if the stock or money be lent *for the express purpose* of settling losses incurred in an illegal stock-jobbing transaction, and be so applied by the borrower, it cannot be recovered by the lender, although he was no partner in the stock-jobbing transaction. Thus in *Cannan* and another v. *Bryce*, 3 Barn. & Ald. 179, the leading facts were these: Amos and Sutherland were merchants in partnership, and in March, 1814, Amos, without the knowledge of Sutherland, entered into an illegal stock-jobbing transaction, by which he sustained so

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a certain indenture of five parts, bearing even date with the above written bond or obligation, and made, or expressed

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though he was no partner in the stock-jobbing transaction.

heavy a loss, that he was unable to pay it, either with his own private funds or with the funds of the partnership. The defendant lent the produce of 5000*l.* 4 per cent. consols, *for the purpose of paying such loss*, and it was applied for that purpose. In consideration of this money so lent, Sutherland joined Amos in a bond to the defendant, which bond, by some mistake, had no condition annexed. In consequence of this it was afterwards cancelled, and another bond, in the penal sum of 7000*l.* was executed by the same parties on the 10th March, 1815. The condition of this bond was, "to replace the stock on or before the 18th September then next, and in the mean time to pay the dividends." The stock was not transferred in pursuance of the condition of this bond; and the firm of Amos and Co. became very much embarrassed before the 18th September 1815; and Sutherland having committed an act of bankruptcy on the 27th August preceding, went to America, and remained there till after the bankruptcy of Amos. During his absence, Amos had the sole management of the business. Amos afterwards executed to the defendant, at his request, three several deeds of assignment of three several cargoes; the two first of which had been shipped on account of Sutherland and Amos, and the third on account of Amos alone. These deeds were executed by Amos only. On the 17th January, 1816, Amos committed an act of bankruptcy; and on the 9th Feb. following, a joint commission issued against Amos and Sutherland. In April, 1817, the defendant received sums of money on account of the proceeds of each of the three several cargoes, but not enough to cover the debt due on the bond. In an action of assumpsit by the assignees, for money had and received, &c. the jury found a verdict for the plaintiffs, subject to the opinion of the Court of King's Bench on the case; and it was expressly found by the jury, that the defendant was not a *partner* in the stock-jobbing transaction. Lord Chief Justice Abbott, in delivering the judgment of the Court, said, amongst other things, "another point was made upon the effect of the assignments executed, under the circumstances stated, by Amos alone. Upon this point it is only necessary to observe, that, admitting it to be competent to one partner, after an act of bankruptcy committed by another, to dispose of their partnership property in discharge of legal demands upon the partnership; yet, it is not competent for him to do so in discharge of a demand to which the partners are not by law liable; and we think the partners were not liable in the present case, because we think the loan

to be made between, &c.) ; *And* if the said [*obligor*], his heirs, executors, administrators, or assigns, should make for making transfer, and paying interest,

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was illegal, and the securities void. By the statute 7 Geo. II. c. 8. s. 5. upon which the objection to the loan in this case arises, it is enacted, "that no money or other consideration shall be voluntarily given, paid, had, or received for the compounding, satisfying, or making up any difference for not transferring any public stock, or not performing any contract or agreement stipulated to be performed ; but that every such contract and agreement shall be specifically performed: and every person who shall voluntarily compound, make up, pay, satisfy, take, or receive such difference money, &c. shall forfeit the sum of 100*l.*" Then, as the statute in question has absolutely prohibited the payment of money for compounding differences, it is impossible to say that the making such payment is not an unlawful act; and, if it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? It will be recollected, that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object. And we think the present case cannot be distinguished in principle from that of the druggist, who sold to a brewer, for the purpose of being mixed with beer, certain drugs, which the latter was prohibited by an act of parliament from mixing with beer. I allude to the case of *Langton and others* v. *Hughes and another,* (1 Maule and Selw. 593,) wherein it was decided, that the druggist could not recover the price of the drugs sold for that unlawful purpose. And if the defendant acted unlawfully in lending his money to the bankrupts, he could not have sued them for recovery of payment; because no suit can be maintained upon an unlawful act: and if recovery could not be enforced at law upon the contract of lending, neither could recovery be enforced upon a bond given for the performance of that contract: the bond was not less void than the contract; and if the bond was void, the assignments mentioned in the case, which were only in furtherance of the bond, and which were made by one of the partners after an act of bankruptcy committed by the other, cannot give to the defendant a right to retain the proceeds of the goods against the plaintiffs, who claim under a commission against both the partners for the benefit of the lawful creditors of both, such commission being grounded upon acts of bankruptcy committed by each of them, before any of the proceeds of the goods had come to the hands of the defendant in pursuance of the assignments." The distinction taken in *Faikney* v. *Reynous,* 4 Burr. No distinction

free from all deductions.

the transfer of the said sum of one thousand pounds five per cent. bank annuities, and pay the amount of the divi-

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between *malum prohibitum* and *malum in se*.

2069, between *malum prohibitum* and *malum in se*, was expressly disallowed in the case of *Aubert* v. *Maze*, 2 Bos. and Pull. 371. And in the above case of *Cannan* v. *Bryce*, the court said, "Indeed, we think no such distinction can be allowed in a court of law; the court is bound, in the administration of the law, to consider every act to be unlawful which the law has prohibited to be done.

Every act is unlawful which the law has prohibited.

If the obligor do not replace the stock on the day appointed, the obligee may recover the value of the stock, either on the day appointed for the transfer, or on the day of trial.

III. In the before cited case of *Sanders* v. *Kentish*, 8 Durnf. and East, 162, it was held, that as the defendant failed in his engagement to replace the stock on the day appointed, the plaintiff might maintain an action against him to recover the value of the stock on the day appointed for the transfer, although the stock had fallen in value before the trial. 2 East, 212. And in *Shepherd* v. *Johnson*, 2 East, 211, it was held, that, in estimating the measure of damages in an action for breach of the condition of a bond to replace stock on a given day, it is not enough to take the value of the stock on that day, if it have risen in the mean time, but the highest value as it stood at the time of the trial; there being no offer of the defendant to replace it in the intermediate time, while the market was rising. Mr. Justice Grose said, "the true measure of damages in all these cases is that which will completely indemnify the plaintiff for the breach of the engagement. If the defendant neglect to replace the stock at the day appointed, and the stock afterwards rise in value, the plaintiff can only be indemnified by giving him the price of it at the time of trial. And it is no answer to say, that the defendant may be prejudiced by the plaintiff's delaying to bring his action; for it is his own fault that he does not perform his engagement at the time; or he may replace it at any time afterwards, so as to avail himself of a rising market." Mr. Justice Lawrence said, "Suppose a bill were filed in equity, for a specific performance of an agreement to replace stock on a given day, which had not been done at the time; would not a court of equity compel the party to replace it at the then price of the stock, if the market had risen in the mean time?" The same measure of damages was adopted in a case of *Payne* v. *Burke*, sittings after Michaelmas Term, 1799, by Lord Eldon, when he was Chief Justice of the Court of Common Pleas. So the cases, *Dutch* v. *Warren*, 2 Burr. 1010, 1011; S. C. 1 Stra. 406, but not so well reported; and *Isherwood* v. *Seddon*, cited 2 East, 212, appear to be now overruled by the last cited cases, and by the following.

dends thereon, free and clear of and from all deductions and abatements whatsoever, and without fraud or further de-

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[It has been very lately held, that the fair rule in assessing damages on a bond to replace stock, is to take the price of the stock on the day of trial, or the day previous. *Harrison* v. *Harrison*, 1 Carring. N. P. C. 413. *Ed.*]

Stock not being transferred at time appointed, and penalty of bond being forfeited, it has been held in equity, that obligee is entitled to the value of the stock at time of transfer, and interest at five per cent.

In *Forrest* v. *Elwes*, 4 Ves. 492, the obligee transferred stock to the obligor, upon bond, with a condition to replace the stock six months after the date, and in the mean time, to pay interest at five per cent. The stock not being replaced, and being depreciated, Lord Alvanley, Master of the Rolls, held, that the obligee was entitled to the *value* of the stock at the time of the transfer, with interest at five per cent. to the date of the Master's report; credit being given for some payments on account of the principal. This case was decided on the above mentioned principle, of the fair measure of the damage sustained by the breach of the condition, by not transferring the stock at the time appointed, in consequence of which the penalty of the bond became forfeited at law: and also, on the habit of the court as to compensation, where a trustee improperly sells out stock; in which case the *cestui que* trust has an opportunity to have either the stock, or the money produced by it, with interest. 4 Ves. 497.

On a bond, conditioned for replacing stock, the obligee is not entitled to special damages for a profit he might have made, if it had been sooner replaced, unless he shews that he demanded payment for that express purpose.

In *M'Arthur* v. *Lord Seaforth*, 2 Taunt. 257, the bond was dated the 27th January, 1801, and given by the defendant to the plaintiff in the penalty of 6000*l.*, reciting a loan from the plaintiff to the defendant of 3200*l.*, five per cent. stock, usually called the Loyalty Loan; and the condition was, that the defendant should re-transfer 3200*l.*, like stock, on or before the 27th January, 1804; and in the mean time, account for and pay the plaintiff the half-yearly dividends. The stock, when first borrowed and converted into money by the defendant, had produced only the sum of 2800*l.* On the 23d of February, 1804, the plaintiff acquainted the defendant that an option was given to the holders of the loyalty loan, to be paid at par by government, after six months notice from the 11th of March then next; and suggested, that as the stock was then about 93½, perhaps the defendant might think it a proper time to replace the 3200*l.*, that the plaintiff might be able to avail himself of the opportunity of giving notice of his desire to be repaid at par six months after, at which time he should have occasion for the money. An option was also given to holders of that stock, to commute their stock for three per cents.; but the plaintiff did not express to the defendant any wish to take three per cents. At the trial, several years after the time appointed for replacing the stock, the plaintiff contended, that he was entitled to recover 3923*l.* 17*s.* 3*d.*

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lay; *Then* the above written bond or obligation shall be void

sterling, which would be the value of 3 per cents. in case he had availed himself of the latter offer of government. The defendant had, before the trial, offered to repay the sum of 3200*l.*, being the amount at par of the stock lent. It was held, that the plaintiff was only entitled to 3200*l.*, with the interest due thereon, up to the day of executing the writ of enquiry of damages: that he was not entitled to recover the price of so much three per cent. stock as he might have obtained in exchange for the five per cents. he not being entitled to special damages for a profit he might have made if the stock had been sooner replaced, unless he had shewn that he demanded payment for that express purpose, and that he should call on the defendant to pay the difference if he did not replace the stock.

[Where one trustee agrees to transfer stock, the other not having assented, such a contract is only a conditional bargain, and no action can be maintained in respect of it. *Leyton* v. *Sneyd*, 2 J. B. Moore, 585. 8 Taunt. 532. S. C. *Ed.*]

Loan on parol agreement to give security to replace stock; positive contract failing by bankruptcy, proof may be made under implied contract.

IV. In the case of a loan upon a parol engagement, to give security to replace stock by a given day, the positive contract failing by an intervening bankruptcy, proof may be made in respect of the contract implied by law from the loan. *Ex parte Coming*, 9 Ves. 115.

If A. lend stock to B., to be replaced as stock, without naming any particular day, and B. become a bankrupt before any request by A. to replace the stock, A. cannot come in under B.'s commission:

but the demand is not discharged by the certificate.

If a person lends a trader stock in the public funds, to be replaced as stock, without naming any particular time at which it is to be invested; and he becomes a bankrupt before he has been required to replace the stock, it is a contingent debt, and cannot be proved under the commission. *Utterson* v. *Vernon*, 3 Durnf. and East, 539, 4 Durnf. and East, 570. Lord Kenyon, in delivering the unanimous opinion of the court, said, "the question in this case depends on a simple principle of law, which cannot be doubted. It is clear, that where one person, previous to his bankruptcy, is indebted to another in a precise sum which is ascertained, the latter may prove his debt under the commission: but it is as clear, that where there is only a cause of action existing, where the debt is to arise on a stipulation which has not been broken previous to the time of the bankruptcy, and where the debt remains to be enquired into, there the creditor cannot prove his debt under the commission, and the demand will remain undischarged by the certificate. That here the stock was to be replaced at the request of the plaintiff who lent the stock; and no such requisition having been made previous to the bankruptcy, no certain debt arose, but it rested altogether in damages to be ascertained by a jury. On this short ground, therefore,

and of no effect, or otherwise shall remain in full force and virtue.

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we are all of opinion, that judgment should be given for the defendants. See also Mr. Justice Ashhurst's opinion, 3 Durnf. and East, 547, S. C.

[But now, under the 56 sec. of the New Bankrupt Act, *post*, 263, it has been held, that although, on a loan, it is agreed that six months notice should be given before repayment was required, although no notice was given, the debt is proveable. *Ex parte Dowman*, 2 Gl. & Jam. 241. *Ed.*]

No proof under a bond to replace stock and pay the dividends; unless forfeited either as to the capital or dividends, before the bankruptcy.

In *Ex parte King*, 8 Ves. 334, the object of the petition was, to prove under a commission of bankruptcy upon a bond, given to secure a loan of stock on the 14th of October, 1801, to be replaced on the 14th of the following October, and the amount of the dividends in the mean time to be paid at the usual periods of paying dividends. The bankruptcy took place on the 9th of March, 1802; and, consequently, before any dividend became payable, such dividend not being due till April. Lord Chancellor Eldon said, "it has often been determined in bankruptcy, that if the condition is broken before the bankruptcy, you may prove: *Ex parte Day*, 7 Ves. 301: but there is no instance of admitting the proof, where the condition was not previously broken. If the bond had been forfeited, either as to the capital or the dividend, it would have done; as if, though the bankruptcy was previous to the time at which the stock was to be replaced, a forfeiture had been incurred by not paying the dividend; and the petitioner might, in either case, have proved. The bond is not within the statute, 7 Geo. I. c. 31; and, therefore, you are without remedy:" excepting as against the bankrupt. *Vide ante*, 261.

Agreement to replace stock on demand, if demand is made before bankruptcy, price may be proved.

Under an agreement to replace stock upon demand, if the demand be made before the bankruptcy, the price of the stock may be proved. *Ex parte Mace*, 8 Ves. 337. [And see *Ex parte Campbell*, 16 Ves. 244.]

If there has been no breach of covenant to transfer before bankruptcy, no proof admitted, unless there be a penalty.

But it seems, that if there be a covenant within seven years, or when requested to transfer stock to a certain amount, and the covenantor becomes bankrupt before the expiration of the seven years, and no request has been made, proof will not be admitted upon the covenant, unless secured by a penalty. *Ibid.*

Bond with collateral security, for replacing stock within

Where by bond, and the collateral security of an equitable mortgage of real estate, stock was secured, to be replaced within three years, and in the mean time the dividends to be paid as they accrued due; the dividends which had accrued due had not been paid, whereby the bond was forfeited at law; afterwards, and before the expiration

three years, and paying dividends in the mean time; breach of condition by not paying dividends; obligor becomes bankrupt before the three years: held that the time is accelerated; estate to be sold, to pay dividends and replace stock; obligee to prove for residue.

of the three years, the obligor became a bankrupt; Sir John Leach, Vice-Chancellor, held, that the obligee was entitled to have an immediate sale of the real estate; that the purchase money should be applied in the first place in paying off the interest or dividends accruing and due upon the stock, and then in replacing, so far as the same would extend, the amount of the stock originally sold out; that the petitioner might prove the amount of so much of the capital stock as the proceeds of the sale should be insufficient to replace; that the petitioner might be paid, out of the separate estate of the bankrupt, a dividend in respect of such proof; and that the assignees were not entitled to have three years to retransfer the stock. *Ex parte Fisher*, 3 Mad. Rep. 159; 1 Buck, 188, S. C.

[The distinctions which were drawn in these cases are now unimportant, as contingent debts may be proved under the 56th section of the 6 Geo. IV. c. 16, which is as follows:

6 G. IV. c. 16, s. 56. Contingent debts may be proved under a commission.

"And be it enacted, That if any bankrupt shall before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive a dividend with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

And see *Atwood* v. *Partridge*, 4 Bing. 209; *Bire* v. *Moreau*, 4 Bing. 57, as to what this section extends to.

The law on this head, with respect to insolvent debtors, remains unaltered by the new act, 7 Geo. IV. c. 57; so that where there was a bond conditioned for the payment of a certain sum within a given period after the arrival of a ship from a foreign voyage, which did not take place till after the obligor had been discharged under the Insolvent Act; as no debt was due until the event happened, the insolvent was held liable. *Hilton* v. *Worrall*, 2 Chit. Cas. temp. Mansf. 448. *Ed.*]

TO INVEST AMOUNT OF DEBT IN STOCK, AND PAY DIVIDENDS IN MEAN TIME.

BOND *to two Executors* (*a*) *from two Persons who were Debtors by Bond to the Testator, for investing in the Names of the Executors, within a given Time, so much Stock Three per Cent. Consols, as the Amount of the Debt would purchase at the Date of the Bond; and to pay the Amount of the Dividends in the mean Time.*

Obligation two to two.

BOND from [*two obligors*] of, &c. to [*two obligees*] of, &c. in the sum of 4000*l.*, *ut ante*, 179.

Recital of bond from the obligors to obligee's testator:

WHEREAS the said [*obligor*] and [*other obligor*], in and by a certain bond or obligation, bearing date on or about the day of , 17 , became, and now stand bound unto [*testator, of the same name as one of the obligees*], deceased, father of the above named [*obligee*], his executors, administrators, and assigns, in the penal sum of 4000*l.*; *With a condition* thereunder written, for making the same void upon payment by the said [*two obligors*], or either of them, their, or either of their heirs, executors, or administrators, unto the said [*testator*], deceased, his executors, administrators, or assigns, of the sum of

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Executor or administrator should not accept security to transfer stock at a given day, in lieu of a debt, unless he has authority so to do.

(*a*) As a general form, the above precedent will be of utility. But, on account of the risque mentioned, *ante*, 261—2, an executor or administrator cannot be advised to consent to such an arrangement as the above in any case; unless, as executor, he has authority by the will so to do, either by express, or general terms; or unless, as executor or administrator, he has the consent of the persons beneficially interested in the money. That such a contract as the above is legal, see *Maddock v. Rumball*, 8 East, 304; *ante*, 252, 256.

It is impossible to refrain from presenting the reader with the two following excellent opinions, although the law on the subject has been

TO INVEST AMOUNT OF DEBT IN STOCK, AND PAY DIVIDENDS IN MEAN TIME.

2000*l.*, of like lawful money, on the 29th day of September, 1793, with lawful interest for the same [as in and by the said bond or obligation, and the condition thereof, reference being thereunto had, will appear.] AND WHEREAS the said [*testator*], the father, departed this life in the month of June, in the year 1794, having first duly made and published his last will and testament in writing, and thereof appointed the said [*obligee*], his son, and [*other obligee*], executors, who, since his decease, have duly proved the same in the proper ecclesiastical court. AND WHEREAS there is now due and owing unto the said [*obligee*] the son, and [*other obligee*], (as executors as aforesaid) upon and by virtue of the said recited bond or obligation, the said principal sum of 2000*l.* and no more; all interest thereupon having been paid up to the day of the above written obligation. AND WHEREAS the said [*obligee*] the son, and [*other obligee*], being desirous of laying out and investing the said sum of 2000*l.* so due and owing to them as aforesaid, together with other monies belonging to the estate of the said [*testator*], deceased, in the purchase of stock in the three per cent. consolidated bank annuities, have, for that purpose, applied to the said [*two obligors*], for the immediate payment of the said sum of 2000*l.*; and in consequence of such application, and in order that no loss or inconvenience may arise or happen to the estate of the said [*testator*], deceased, on account of the

Death of testator, appointment of executors, and proof of will:

that principal money is due, but all interest paid;

that executors being desirous of investing the sum due, with other monies in the stocks:

have applied to obligors for the immediate payment;

in order that no loss may arise, obligors propose that the

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subsequently pretty clearly settled. The first was given by the profoundly learned Mr. Justice Holroyd, and the other by the late Mr. Justice Chambre, when they were at the bar. Under the next precedent, there is a very clear opinion on the same point by the late Mr. Shadwell.

Mr. Holroyd's opinion on executor's accepting a bond to purchase and transfer stock on a future day, at the present day's price, in satisfaction of a debt due to the testator.

MR. HOLROYD'S opinion on the above bond.

A loan of stock, to be replaced with the same quantity of stock, at a subsequent period, with interest to be paid in the mean time, to the amount of the dividends of the stock, has been held to be legal, and not usurious; although the amount of the interest exceeds the rate of five per cent. on the sum raised by the stock, in a case where the transaction appears fair and *bonâ fide*, and not intended as a shift to evade the statute, and cover an usurious contract. See 3 Term Rep. 531. The

TO INVEST AMOUNT OF DEBT IN STOCK, AND PAY DIVIDENDS IN MEAN TIME.

non-payment of the said sum of 2000*l.* to his said executors, for the purposes aforesaid, on this day, but that the same estate may be in the same situation as if the said sum of 2000*l.* were paid in on this day, and invested in stock as aforesaid, they the said [*two obligors*] have proposed to the said [*two obligees*], that in lieu and instead of the actual payment to them of the said sum of 2000*l.*, and in satisfaction thereof, such sum of 2000*l.* shall henceforth be considered as invested in the purchase of three per centum consolidated bank annuities; *And* to that end, that they the said [*two obligors*] shall and will, on or before the 27th day of November, [which will be in the year of our Lord] 1797, invest, or cause to be invested, on the account, and in the names of, and as the property of them the said [*obligee*] the son, and [*other obligees*], or the survivor of them, his executors, administrators, or assigns, so much capital stock of the three per centum consolidated bank annuities as the said sum of 2000*l.* would (if actually laid out and invested therein), have produced or purchased, according to the custom, market price, or value of the said stock on the day of the date of the above written obligation: *And* that in the mean time, until such purchase or transfer shall be made, shall and will (in lieu and satisfaction of lawful interest upon the said sum of 2000*l.*) pay, answer, and make good unto them the said [*obligee*] the son, and [*other obligee*], their executors and adminis-

amount shall be considered as invested this day;

and that obligors will, within a given time, invest in executors' names so much stock as the sum would purchase this day:

and to pay the amount of dividends in mean time:

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present transaction appears to me, in substance, the same as if, from the time of the bond, the loan was of so much stock, to be replaced by the same quantity of stock, with the payments of the dividends in the mean time. Whether the stock itself, or its produce, or the amount of what would be its produce, is lent, appears to me is, in effect, the same thing. It is not lent as money; for the sum of money, or its amount in money, is not to be returned, but the quantum of stock only; which may be in value more, or it may be less than the sum of money. If less, it will be to the disadvantage of the lender: and so far his principal is in hazard; for so much of the stock as shall have diminished in price, so much of his principal will he loose. If higher, he will gain. As, therefore, the principal sum of money is not to be returned, but a substitute, which may be of more or less value; and as the principal

TO INVEST AMOUNT OF DEBT IN STOCK, AND PAY DIVIDENDS IN MEAN TIME.

trators, all such dividends and produce as might or could have been produced, or as they would have been entitled to receive from or upon account of the said stock, in case the said sum of 2000*l.* had been on the day of the date of the above written obligation actually laid out in the purchase of the same capital stock of the three per centum consolidated bank annuities: *To* which proposal they the said [*obligee*] the son, and [*other obligee*] have, for the accommodation of the said [*two obligors*], consented and agreed. AND WHEREAS the said stock of three per centum consolidated bank annuities is, at this the said day of , 1796, the date of the above written obligation, of the price or value of pounds per centum, and no more.

the value of stock this day.

Condition for investing the stock on a given day:

NOW THE CONDITION of the above written obligation is such, *That* if the above bounden [*two obligors*], or either of them, their, or either of their heirs, executors, or administrators, shall and do (should), on or before the 27th day of November, [which will be in the year of our Lord] 1797, well and truly invest, or cause and procure to be invested, on the account and in the names, and as the property of them the above named [*obligee*] the son, and [*other obligee*], or of the survivor of them, his executors or administrators, in the books of the Governor and Company of the

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sum is thereby in part fairly and *bonâ fide* hazarded, it seems to me that the contract is not usurious. See Cro. Jac. 507. 1 Atk. 342, 350. 2 Blackst. 863. Cowp. 115, 793.

But, besides the question of usury, it will be right to advert to another question, whether this contract is or is not illegal, by reason of the 8th section of the stock-jobbing act, statute 7 Geo. II. c. 8, which declared all contracts null and void, for buying, selling, assigning, or transferring stock, where the person contracting is not, at the time of the contract, possessed of the stock; and inflicts a penalty of 500*l.* on making such contract. I have altered the words of the condition of the bond, because they *expressly* engaged, as they do now in *effect*, to buy and transfer, using the very words of the act. But, as that section of the act expressly recites the *mischievous practice of persons selling* and disposing of *stocks* of which they are not possessed; and as the clause

Bank of England, so much capital stock of the three per centum consolidated bank annuities as the said sum of 2000*l.* [of lawful money of Great Britain [and Ireland]] would have bought or purchased upon the day of the date of the above written obligation, [if the same had been, on the day of the date of the above written obligation, laid out and invested in the said stock,] at the said price of per centum for every 100*l.* stock of the said stock: AND LIKEWISE shall and do (should) answer, pay, and make good unto them the said [*obligee*] the son, and [*other obligee*], or the survivor of them, his executors or administrators, the amount of all dividends, interest, and produce which, in the mean time, would be paid, made, or received for or upon account of the said stock, in case the same had been, on the day of the date of the above written obligation, actually purchased by or with the said sum of 2000*l.* at the price aforesaid, and had been invested and continued in the names, and as the property of them the said [*obligee*] the son and [*other obligee*], their executors, administrators, and assigns, *Then*, &c.

TO INVEST AMOUNT OF DEBT IN STOCK, AND PAY DIVIDENDS IN MEAN TIME.

And to pay the dividends in the mean time.

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is for the express purpose of suppressing *that mischief*, I am inclined to think this case not within the statute. For this is not, nor does it import to be, a sale of stock by the borrower, but a contract, in effect, of a different nature; namely, in effect, a borrowing and replacing of that stock which the money would now produce, and which the lender would immediately have, if the money were now paid to him. The same objection, if it apply to such a case, would, I think, apply to the above case in the Term Reports, and to one in the same book, p. 539; [*vide*, S. C. 4 Durnf. and East, 570, *et ante*, 261;] but it was not taken, either by the counsel or court, in either of those cases. However, as the sum is large, as the lenders are executors, and as the consequences either of usury, or of the stock-jobbing act, are so very penal, where they attach, I wish the parties in this case not to rely on my opinion alone, which may be mistaken, but to take a further opinion on both these points, before they rely on this bond as a good security: and I think it adviseable that they should do so.

G. S. HOLROYD,
Gray's Inn, 10th December, 1796.

MR. CHAMBRE'S OPINION.

Mr. Chambre's opinion.

The points to be considered in this transaction, and the legal reasoning that applies to them, are stated with great perspicuity, in the opinion of my friend, Mr. Holroyd. Upon the question of usury, were I to advise upon a case that had already happened, I should, without hesitation, concur with the opinion he has given, and for the same reasons; especially that which is founded upon the risque of the value of the principal. In advising prospectively, I might remark, that the lender, or persons standing in the situation of the executors, should run no risque whatever of the penal consequences of usury; and that in the case referred to in the Term Reports, Lord Kenyon appears to lay some stress on the fact, that there was a real loan of stock; and that there must, in such cases, be some little degree of risque in leaving to a jury the fact, whether the mode of transacting the business is or is not a device to cover an usurious contract. In the case cited, a good deal of stress is laid on the finding of a jury.

The latter question, which arises upon the stock-jobbing act, I think by no means clear; and that is a decisive reason for my advising the executors not to run the risque of it. Though this is not the intention of the parties, or of those gaming or speculating contracts, which the act meant to put a stop to, it follows too exactly within the letter of the act, (being a contract for the buying of stock of which the obligors are not possessed), to be perfectly safe: and, though I think there is considerable weight in the argument to support the transaction, yet it appears that there is great uncertainty of the court's weakening a very beneficial law by nice distinctions or exceptions, in cases comprehended in the terms of such a law *.

A. CHAMBRE,
Gray's Inn, 31st December, 1796.

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* The point is now settled by *Maddock* v. *Rumball*, 8 East, 304, *ante*, 251, 256; and see Mr. Shadwell's opinion, *post*, 270.

TO REPLACE STOCK ON REQUEST, AND PAY DIVIDENDS IN MEAN TIME.

BOND *from Four to One, for replacing East India Stock on Request* (*a*) *; and for paying the Amount of the Dividends in the mean Time.*

Obligation four to one.

BOND from [*four obligors*], all of, &c. merchants and copartners, to [*obligee*] of, &c. in the penal sum of 8000*l.* *ut ante*, 181.

Recital of agreement to lend East India stock,

WHEREAS the above named [*obligee*] hath, at the instance and request of the above bounden [*obligors*], agreed to lend them one thousand nine hundred and one pounds fourteen shillings, East India stock, standing in the name of the said [*obligee*] in the books of the honourable the united company of merchants trading to the East Indies; they the said [*obligors*] engaging to replace the said East India stock in the name of him the said [*obligee*] on

obligor's engaging to replace it on de-

(*a*) CASE.

Case on the above bond, for Mr. Shadwell's opinion.

Since this bond was given, doubts have been entertained, whether, as it engages to re-invest stock, which was not actually standing in the obligors' names at the time of the engagement, it does not come within the penalties 7 Geo. II. chapter 8. s. 8. And whether, if it does not, it could be proved in case of a bankruptcy against the obligors, previous to a notice in writing, requiring the transfer to be made, pursuant to the condition.

Your opinion is desired, whether the bond, in its present state, is valid, and sufficient to enable the obligee to obtain the retransfer of his stock. And you are also desired to advise, whether any, and what form of notice is necessary from the obligee to the obligors, requiring the transfer at a given time, so as to give the obligee the advantage of proving the bond in case of a bankruptcy.

If you should think the bond is not so perfect as it might have been

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demand, and to pay him the amount of the interest and dividends which from time to time would have arisen and accrued to the said [*obligee*] thereon, had the same stood and remained in his name in the books of the said company, by equal half yearly payments in the mean time. AND WHEREAS the said [*obligee*] hath accordingly this day transferred out of his name, and sold the said one thousand nine hundred and one pounds fourteen shillings East India stock, as by the books of the said company, reference being thereunto had, will appear; which sale was made for the use and benefit of them the said [*obligors*], as they do hereby acknowledge.

mand, and to pay dividends in mean time. Recital of having sold stock for the use of obligors.

Condition for replacing East India stock, on request.

NOW THE CONDITION of the above written obligation is such, *That*, if the said [*obligors*], their heirs, executors, or administrators, shall and do (should, *vide ante*, Vol. II. 599), whenever thereunto required by the said [*obligee*], his executors, administrators, or assigns, well and truly, and without fraud or delay, replace and retransfer unto and into the name or names of him the said [*obli-*

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to answer the purpose, please to make such alterations therein as may be necessary.

Mr. Shadwell's opinion.

I think the bond valid; and that the transaction does not come within the act alluded to. The whole transaction is to be taken together, as I conceive; and then the obligee, the owner of the stock, became, by means of the contract, and at the time of it, a trustee * of the stock for the obligors, although, by their direction, he sold it for their proper use; and the act only makes those contracts for transferring stock at a future time void, where the contractor was not possessed of,

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* Mr. Justice Bayley, when at the bar, urged the same distinction two years afterwards, in *Sanders* v. *Kentish*, 8 Durnf. & East, 164. However, the court did not think the case came within the meaning of the prohibitory clauses in the act, but that it was within the exception in the eleventh section; and did not notice the point urged. Probably there is more ingenuity than solidity in the above distinction. It certainly cannot be applied to cases where a debtor agrees to purchase so much stock on a given day as the amount of the debt would purchase at the time of the contract. *Vide ante*, 256.

gee], his executors, administrators, or assigns, in the said books of the said company, one thousand nine hundred and one pounds fourteen shillings East India stock, in lieu of that so transferred and sold by the said [*obligee*], for the use and benefit of the said [*obligors*] aforesaid, so that the said [*obligee*], his executors, administrators, or assigns, shall and may, immediately after such demand made, be reinstated in the entire and absolute possession, use, and disposal thereof; AND ALSO if the said [*obligors*], their heirs, executors, or administrators, shall and do (should), from time to time, and at all times hereafter, in the mean time, and until the said one thousand nine hundred and one pounds fourteen shillings East India stock, shall be so repurchased and re-transferred as aforesaid, well and truly pay, or cause to be paid unto the said [*obligee*], his executors, administrators, or assigns, so much money as shall be equal to the interest and dividends which would from time to time, until such re-transfer have accrued due, and become payable on the said one thousand nine hundred and one pounds fourteen shillings East India stock so transferred as aforesaid, by equal half yearly payments in every year; namely, on the day of and the day of in every year: being the days on which the said interest or dividends would have become payable; and at which

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and for paying dividends in mean time.

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or entitled to the stock, at the time of making the contract. A contract like the present was held good by the Court of King's Bench, in the case of *Tate* v. *Wellings*, 3 T. R. 531.

In case of the obligor's bankruptcy before being required to make the retransfer *, I should question the right of the obligee to prove under the commission; but to give him that right, I should conceive that a letter from him to them, merely saying, "I require you to transfer into my name one thousand nine hundred and one pounds fourteen shillings, East India stock, immediately, pursuant to your bond," is fully sufficient.

If the bond had not been already given, I should have recommended

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* Failure in paying the dividends would have the same effect. *Vide ante*, 262.

TO REPLACE STOCK ON REQUEST, AND PAY DIVIDENDS IN MEAN TIME.

the said [*obligee*] would have been entitled to have and receive the same, had his said East India stock remained in his name: the first payment thereof to begin and be made on the day of next ensuing the date of the above written obligation; *Then* the above written obligation shall be void, and of no effect; otherwise the same obligation shall remain in full force and virtue.

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an alteration in the obligatory part, as suggested on the first side *; but perhaps it may not be thought worth while to have a new bond, merely to obviate the objection mentioned in the margin. In all other respects the present bond seems substantially right.

LANCELOT SHADWELL,
Lincoln's Inn, 22d March, 1797.

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* The alteration suggested is, "we are, jointly and severally, or any two or more of us, are held and firmly bound, &c. Without some such alteration, an action could not be brought against two or three of the four, during the lives of the four.

L. S."

As to this distinction, *vide ante*, Vol. I. 502, 312, 634; Vol. II. 608; *ante*, 182; and see *South* v. *Tanner*, 2 Taunt. 254.

BOND *from a Residuary Legatee to an Executor, for Payment of Legacies after the Obligor's Death, where a Testator gave several Legacies to be paid Six Months after the Death of the Residuary Legatee, with Interest from her Death; and directed her, within one Month from his Decease, to give a Bond to his Executor, for paying the Legacies accordingly; but if she neglected to give the Bond, he revoked the Bequest to her.*

FOR PAYING LEGACIES AFTER OBLIGOR'S DEATH, UNDER DIRECTIONS OF WILL.

BOND from [*obligor*] of, &c., widow, to [*obligee*] of of, &c. gentleman, in the penal sum of one thousand pounds, *ut ante*, 179.

Obligation from one to one.

WHEREAS [*testator*], late of above mentioned, gentleman, deceased, duly made and published his last will and testament in writing, bearing date the day of , 18 ; and thereby gave and bequeathed the sum of two hundred pounds unto his brother, the above named [*obligee*] ; and the sum of two hundred pounds unto his sister S. the wife of F. T.; and he also gave and bequeathed the sum of one hundred pounds unto his nephew T. B., and his niece E. B., (children of his late brother T. B., deceased, in equal shares and proportions. *And* the said testator directed, that all the said legacies should be paid at the end of three calendar months next after the death of the above bounden [*obligor*], together with lawful interest for the same from the day of her death. *And* the said testator, by his said will, provided and declared, that in case the said [*obligee*] should die in the life time of the said [*obligor*], all and every the child and children of the said [*obligee*] who should be living at his decease, should stand in his place, and be entitled to the said legacy thereby bequeathed to him as aforesaid, and the interest thereof:

Recital of will bequeathing legacies to be paid three months after obligor's death, with interest from that time:

in case of legatee's death, his children to be entitled to legacy:

same as to another legatee

FOR PAYING LEGACIES AFTER OBLIGOR'S DEATH, UNDER DIRECTIONS OF WILL.

and that in case the said S. T. should die in the lifetime of the said [*obligor*], all and every the child and children of the said S. T. who should be living at her decease, should stand in her place, and be entitled to the said legacy bequeathed to her as aforesaid, and the interest thereof: and that in case either of the said legatees, T. B. and E. B. should die in the lifetime of the said [*obligor*], the said legacy of one hundred pounds, and the interest thereof, should be paid to the survivor of them: and that in case both of the two last named legatees should die in the lifetime of the said [*obligor*], the said legacy of one hundred pounds, and the interest thereof, should be paid to and equally divided between the said [*obligee*] and S. T. *And* the said testator, by his said will, gave and bequeathed all his personal estate, which was not thereinbefore given and disposed of, and which should not be applied in the payment of his debts, or in defraying his funeral and testamentary expenses, unto the said [*obligor*], in case she should survive him the said testator. *And* the said testator, by his said will, provided and directed, that the said [*obligor*], in case she should survive him the said testator, should, within one calendar month next after his decease, enter into and execute a bond unto the said [*obligee*], his executors or administrators, binding herself, her heirs, executors, and administrators, in the penal sum of one thousand pounds, with a condition for making void the same upon payment of the said legacies and interest, according to the directions of his said will: *but* in case the said [*obligor*] should refuse or neglect to enter into and execute the said bond, then the said testator did, by his said will, revoke the bequest thereby made to her as aforesaid; and did declare that she should not receive any benefit under his said will. *And* the said testator appointed the said [*obligee*] sole executor of his said will. AND WHEREAS the said [*testator*] hath since departed this life, without having revoked or altered his said will: and the same hath been duly proved by the said [*obligee*] in the proper ecclesiastical court.

in case either of two dying before obligor, the whole sum given between them to go to the survivor; and if both die before obligor, the whole sum to be paid to two others: that testator gave residue to obligor,

and directed her, within one month from his decease, to give a bond to his executor, for paying legacies according to will;

but if she neglected to give bond, he revoked the bequest made to her:

appointment of executor: testator's death, and proof of will.

NOW THE CONDITION of the above written bond or obligation is such, *That* if the heirs, executors, or ad-

Condition for paying legacies and inter-

ministrators of the said [*obligor*] should well and truly pay, or cause to be paid, the several legacies or sums of money, and interest, by the hereinbefore in part recited will of the said [*testator*] given, or directed to be paid as aforesaid; and for payment whereof, the said [*obligor*] was directed to enter into such bond as aforesaid, as and when the same respectively shall become due and payable, according to the directions of the said will; *Then* and in such case the above written bond or obligation to be void, otherwise to be and remain in full force and virtue.

FOR PAYING LEGACIES, AFTER OBLIGOR'S DEATH, UNDER DIRECTIONS OF WILL.

est after obligor's death, according to the directions of the will.

BOND *from the Purchaser to the Vendor of an Estate charged with Legacies, payable to Two Infants when they respectively come of Age, where it had been agreed, that Part of the Purchase Money, being the Amount of the Legacies, should remain in the Purchaser's Hands,*—FOR PAYING THE LEGACIES *as the Infants come of Age; and, if both or either of them should die under Age, then to pay the Legacies or Legacy to the Vendor, within Three Months:* AND *for paying to the Vendor,* INTEREST *on the Legacies, until they shall be respectively paid.*

FROM PURCHASER, FOR PAYING LEGACIES CHARGED ON LANDS, AND INTEREST IN MEAN TIME.

BOND from [*purchaser*] of, &c. to [*vendor*] of, &c., in the penal sum of pounds, *ut ante*, 179.

Obligation from one to one.

WHEREAS [*testatrix*] late of, &c. widow, deceased, late mother of the above named [*vendor*], being entitled to or having a disposing power, amongst other things, of a noblesworth of land in aforesaid, made her last will and testament in writing, bearing date on or about the day of , 18 , and thereby gave to her

Recital of devise of lands, subject to payment of legacies when infants became of age.

FROM PURCHASER, FOR PAYING LEGACIES CHARGED ON LANDS, AND INTEREST IN MEAN TIME.

eldest son [*vendor*] the said land: *And*, among other bequests, thereby bequeathed to her grand children, J. C. and A. C., each of them four pounds, when they came to the age of twenty-one years; which legacy, by virtue of the said will, became well charged upon the said noblesworth of land. AND WHEREAS the above bounden [*purchaser*] hath, by indentures of lease and release, bearing date on or about the and days of 18 , for a valuable consideration, purchased the said land: *And* thereupon it hath been, and is agreed by and between the said [*vendor*] and [*purchaser*], that eight pounds, part of the money to be paid for the said purchase, should remain in the hands of the said [*purchaser*], to be paid and applied in discharge of the several sums of four pounds, or otherwise, as hereinafter is mentioned: *And* that the same should stand charged upon the said purchased premises until the actual payment thereof:

Recital of lease and release to purchaser;

and agreement that part of purchase money, the amount of the legacies, shall remain in purchaser's hands.

NOW THEREFORE THE CONDITION of the above written obligation is such, *That* if the said [*purchaser*], his heirs, executors, or administrators, should well and truly pay or cause to be paid the said several sums of four pounds a piece to the said J. C. and A. C. respectively, as and when they shall respectively attain the age of twenty-one years: AND in case both or either of them should die under that age, in which case the legacy of him, her, or them so dying will not survive to his, her, or their representatives; *Then*, in case the said [*purchaser*], his heirs, executors, or administrators, should well and truly pay, or cause to be paid to the said [*vendor*], his executors, administrators, or assigns, the said legacy or legacies of the said J. C. and A. C., or such of them so dying, within three calendar months next after his or her respective death; AND ALSO if the said [*purchaser*], his heirs, executors, or administrators, should well and truly pay, or cause to be paid to the said [*vendor*], his executors, administrators, or assigns, interest for the said several sums of four pounds and four pounds, or such of them as for the time being shall remain unpaid, henceforth until the same shall become payable, after the rate of four pounds per centum per annum; *Then*, &c.

Condition for paying legacies as infants come of age:

and if both or either die under age, then to pay to vendor the legacy within three months:

and for paying to vendor interest on legacies, until they shall be respectively paid.

BOND *from a Legatee to an Executor, on Payment of the whole Legacy, or a Part of the Legacy,* TO REFUND, *if there should be a Deficiency of Assets.*

LEGATEE TO REFUND ON DEFICIENCY OF ASSETS.

BOND from [*legatee*] of, &c., to [*executor*] of, &c., in double the amount of the sum paid, *ut ante*, 179.

Obligation one to one.

WHEREAS [*testator*], late of, &c., deceased, by his last will and testament in writing, bearing date on or about the day of 18 ; gave and bequeathed unto the said [*legatee*], the sum of pounds, to be paid within six calendar months next after his, the said testator's decease ; and appointed the said [*executor*], the executor of his said will : And the said testator died on or about the day of last past ; and shortly after his decease the said [*executor*] duly proved the said will in the Prerogative Court of the Archbishop of Canterbury. AND WHEREAS (*a*) the said [*executor*]

Recital of a will bequeathing a legacy :

death of testator, and proof of will :

that executor has not ascer-

(*a*) If only a part of the legacy be paid, say,

PART PAYMENT.

"AND WHEREAS the said [*testator*], by his said will, bequeathed several other pecuniary legacies, amounting together with the said [*legacy*] pounds given to the said [*legatee*] as aforesaid, to the full sum of thousand pounds. AND WHEREAS the said [*executor*] alleges, that the personal estate of the said [*testator*] will not (as he verily believes) after payment of his debts, funeral expenses, and the necessary charges incident to the said executorship, be near sufficient to pay the whole of the said pecuniary legacies ; and he is doubtful whether all the debts owing by the said [*testator*], at his death, are yet come to his knowledge : notwithstanding which he is desirous and willing to pay so much of the said legacies as

Recital that testator gave several other pecuniary legacies :

that the executor believes testator's effects will be insufficient to pay the legacies ; and is doubtful whether all his debts are come to executor's knowledge : but that he is willing to pay legacies so far

LEGATEE TO REFUND ON DEFICIENCY OF ASSETS.

hath not yet ascertained the amount of the debts and credits of the said [*testator*], but as he believeth that the assets of the said [*testator*] will be sufficient to pay his debts, and the several legacies given by his said will, he the said [*executor*] hath agreed to pay to the said [*legatee*], his said legacy of pounds, on his entering into the above written obligation, with such condition as is hereinafter contained.

tained amount of debts and credits; but believing there will be enough to pay debts and legacies, has agreed to pay legacy on having bond.

Condition that in case of deficiency of assets if legatee should refund;

Now the Condition of the above written obligation is such, that if the personal estate of the said [*testator*] deceased, should not prove sufficient to pay his just debts and funeral expenses, and the necessary charges of the said executorship (*b*), and all the pecuniary legacies given by the said will, then if the said [*legatee*], his heirs, executors, or administrators, should within fourteen days next after notice thereof to him or them given in that behalf, well and truly repay to him the said [*executor*], his executors, administrators, or assigns, the said sum of pounds, so paid to him as aforesaid, or so much thereof as shall appear to be more than was coming due to

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as assets extend:

the personal estate of the said [*testator*] come to his hands will extend to satisfy and pay, on being indemnified, and saved harmless for so doing. And whereas the said [*executor*] hath in his hands of the personal estate of the said [*testator*], sufficient to pay all the debts of the said testator yet come to his knowledge, his funeral expenses, and the necessary charges of the said executorship to the date hereof, and also a fifth part of the pecuniary legacies bequeathed by the said recited will. And whereas the said [*executor*] hath, on the day of the date of the above written obligation, at the request of the said [*legatee*], and on his promise of indemnity for so doing, paid unto him the said [*legatee*], the sum of pounds, being a fifth part of the sum of [*legacy*] pounds, given him by the said in part recited will as aforesaid."

that after payment of debts, &c. executor has assets to pay one-fifth of legacies:

that he has paid legatee one-fifth of his legacy, on his promise of indemnity.

PART PAYMENT.

(*b*) If only a part of the legacy be paid, say, "and a (fifth) part of all the pecuniary legacies," &c., *ut supra*.

him out of the personal estate of the said [*testator*], in respect of the said legacy of pounds, given to him by the said in part recited will as aforesaid, in proportion to the other pecuniary legacies under the said will: AND ALSO if the said [*legatee*], his heirs, executors, or administrators, should from time to time, and at all times hereafter, save, defend, keep harmless and indemnified, the said [*executor*], his executors and administrators, and the estate of the said [*testator*], of and from all costs, charges, damages, and expenses which shall or may happen or come to him or them, or the estate of the said [*testator*], for, or by reason, or means of the said [*executor*] having paid the said [*legatee*] the said sum of pounds, in (*c*) full for the said legacy, as aforesaid, or any matter, cause, or thing, relating thereto; *Then* the above written obligation to be void and of no effect; otherwise the same obligation to be and remain in full force and effect.

LEGATEE TO REFUND ON DEFICIENCY OF ASSETS.

and indemnify executor from all costs, &c. by reason of his having paid legacy,

then obligation to be void.

SEALED AND DELIVERED, (being first duly stamped) in the presence of

Attestation.

(*c*) If only a part of the legacy be paid, say, "part of the said legacy," &c. *ut supra*.

PART PAYMENT.

GOVERNORS OF WORKHOUSE TO REFUND, ON DEFICIENCY OF ASSETS.

BOND *from the President, and Two of the Governors of a Workhouse, to Executors, to refund a Legacy given to the Workhouse, in case of Deficiency of Assets.*

Obligation three to two.

BOND from [*the president and two governors of the London Workhouse*] to [*two obligees*] of, &c., in in the sum of 100*l.*, *ut ante*, 179.

Recital of a bequest to the London Workhouse;

appointment of executors;

proof of will; and payment of legacy.

WHEREAS [*testator*], late of, &c. deceased, by his last will and testament, bearing date on or about the day of , 18 , did give and bequeath unto the London Workhouse, a legacy or sum of fifty pounds; and of his said will appointed the above named [*two obligees*] executors; who since the testator's death, have duly proved the same: *And* on the day of the date of the above written obligation, they have paid the said sum of fifty pounds unto the said president, and governors, or unto their treasurer, for the use of the said London Workhouse.

Condition, that if within six years, deficiency of assets should appear, if the president and governors of the poor for the city of London, within three months after proof of deficiency be made, should refund rateably.

NOW THE CONDITION of the above written obligation is such, *That* if at any time, within the space of six years, now next ensuing, there should happen and appear to be a deficiency in the estate of the said [*testator*], to pay and satisfy his just debts, which he owed at the time of his decease; as also the legacies given by his said will; then if the president and governors, or their successors, presidents and governors for the poor of the city of London for the time being, should within three months next after any such deficiency be made to appear to them, by the said [*obligees*], their executors, or administrators, by due proof thereof, refund, and pay back unto the said [*obligees*], their executors or administrators, a rateable and proportionable part and share of the said legacy, or sum of fifty pounds, in an average and proportion with the rest of the legatees named in the said will, of the said

[*testator*], for and towards the making good such deficiency, if any, shall so happen; *Then* the above written obligation shall be void; otherwise shall be, and remain in full force and virtue.

GOVERNORS OF WORKHOUSE TO REFUND, ON DEFICIENCY OF ASSETS.

BOND *for the faithful Service of a Clerk, either to two Partners, or to them and their Executors or Administrators, and notwithstanding an Alteration in the Firm.*

FAITHFUL SERVICE OF CLERK.

BOND from [*principal*], of, &c., and [*two sureties*] of, &c., jointly and severally, to [*two partners*] of, &c., in the penalty of 2000*l.*, *ut ante*, 179.

Obligation, three to two.

WHEREAS the above named [*two partners*] have lately admitted the above bound [*principal*] into their service as their clerk, and have agreed to retain and continue him in their said service, on his obtaining two respectable persons to become sureties for his duly and faithfully accounting to them the said [*two partners*] (*a*), in manner

Recital of having taken clerk:

(*a*) The above form is adapted to the case where the sureties intend their guaranty should only extend to the faithful service of the clerk while he remains in the employ of the obligees. *Vide ante*, 236—240. But if it be intended that they should be guarantees for the faithful service of the clerk while he remains in the service of the obligees, as well as the survivor of them, or their or either of their executors or administrators, and notwithstanding new partners, then say,

FOR FAITHFUL SERVICE AFTER ALTERATION IN FIRM.

"or the survivor of them, their or his executors or administrators, and other the persons or person who shall or may become partners or partner with them, or any or either of them, and their or his executors or administrators, in manner," &c. *ut supra.*

If the clerk is to be employed in an unincorporated public company,

TO TRUSTEES OF UNINCOR-

FAITHFUL SERVICE OF CLERK.

hereinafter mentioned, and for his faithful and honest con-

PORATED PUBLIC COMPANY.

as the oligation should be made to trustees, after describing them, add,

"trustees for the society or partnership called the company."

The other parts of the bond may be as follows:

Recital of choice, and admission as clerk of a company.

"WHEREAS the said [*clerk*] hath been chosen, and is admitted a clerk in the said company; and the said [*sureties*] have agreed to enter into the above obligation, as sureties for the fidelity of the said [*clerk*], while in the service of the said company.

Condition for clerk's faithful service:

NOW THE CONDITION of the above written obligation is such, that if the said [*clerk*] do and shall from time to time, and at all times hereafter, during his continuance in the said service of the said company, faithfully, honestly, diligently, and carefully execute, perform, and discharge the said service; and all and every other services of the said company, wherein he is, shall, or may be employed; or whereunto he is, shall, or may be called;

that he, on request, shall deliver just accounts:

And shall, so soon as he shall be thereunto required, give and deliver in writing, a just and true account of all monies, notes, bills, securities for money, goods and effects whatsoever, which in the said service shall come to the hands of the said [*clerk*], or which he shall be entrusted with by or on account of the said company:

and pay the balance thereof;

And also make good, answer for, and pay the monies due on the balance of such account to the said company, or such persons as the said company, or the court of directors thereof for the time being, shall appoint:

and to indemnify the company from all losses, &c. by reason of any act done by clerk.

And shall and do, moreover, well and sufficiently save harmless, and keep indemnified the said company, and the directors and all other members thereof, from and against all losses, costs, charges, damages, and expenses, which shall or may happen or come to them, for or by reason of any act, deed, matter, or thing whatsoever, done or omitted to be done by the said [*clerk*], in or during his said service; then this obligation to be void," &c. *ut supra*.

duct during the time of his continuance in (*b*) their ser- FAITHFUL SERVICE OF CLERK.

For in *Metcalfe* and others v. *Bruin*, 2 Campb. 422, in an action of debt on a bond, dated 18th June, 1803, in the penal sum of 2,000*l.*, with a similar condition to the above; the defendant after craving oyer pleaded; first, *non est factum*: secondly, performance. The replication to the second plea assigned various breaches of the condition by the clerk, from the 1st of January, 1804, to the commencement of the suit; which were denied by the rejoinder.

A bond of indemnity given to the trustees of a public unincorporated insurance company, conditioned for the good conduct of a clerk while in the service of the *said company*, remains in full force during the period the clerk continues to serve the company, although there be changes among the individual members of whom the company is composed.

It appeared that the plaintiffs were five of the trustees of the Globe Insurance Company; that this company is unincorporated; but that four years after the date of the bond, the members obtained two acts of parliament, to enable them to sue and be sued in the name of their treasurer; that there has been a continual fluctuation in the members of the company; that in the years 1803, 4, and 5, many old members went out and new ones came in; and that there were, generally, upwards of a hundred changes in the course of a year.

For the defendant, it was contended, "that as soon as there was any change among the members of the company, the bond was at an end. The Globe Insurance Company not being a corporation, is like any other partnership or mercantile firm: and there is no point of law better established, than that a bond conditioned for the good conduct of a clerk to any partnership, ceases to operate the moment an old member goes out of the partnership, or a new one comes in. The notion that the security is given to the *house*, and not to the individuals composing it, has been long exploded. The defendant might have great confidence in the prudence and diligence of some of the members of the Globe Insurance Company who retired; and he might have such an opinion of the negligence and folly of some who bought in, that he would by no means have become bound for a clerk under their superintendance. But none of the breaches were proved. By the words '*said company*' in the condition, must be understood, the company in

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(*b*) If for faithful service, notwithstanding an alteration in the firm, say, FOR FAITHFUL SERVICE AFTER ALTERATION IN FIRM.

"either in the service of the said [*two partners*], or of the (survivors or) survivor of them, their or his executors or administrators, or other the person or persons who shall or may become partners or partner with them, or any or either of them, or their or his executors or administrators: *And*," &c. *ut supra*.

FAITHFUL SERVICE OF CLERK.

Agreement to become sureties.

vice: And the said [*two sureties*] have, at the request of the said [*principal*], agreed to become such sureties, and have for that purpose executed the above written bond or obligation.

Condition for faithful service of clerk:

NOW THE CONDITION of the above written obligation is such, that if the said [*principal*] shall and do,

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existence at the execution of the bond; and that company had ceased to exist, and another partnership was formed, before any of the money had been received by the clerk which he had not brought to account." However, this reasoning was overruled; for Lord Ellenborough said, "Where a bond of indemnity is given for the conduct of a clerk in a banking house, or any common partnership, the law is clearly as it has been laid down; and the instant there is a change in the firm, the indemnity is at an end. But *the Globe Insurance Company* is necessarily a flux body; and its constitution must have been contemplated when the bond was given. This, like other contracts, must be construed according to the intention of the contracting parties. I think the obligor must be taken to have meant *the Globe Insurance Company for the time being*; and I am therefore of opinion that his responsibility is not affected by a change among the members of which it is composed."

The plaintiff had a verdict; and the ensuing term the Court of King's Bench discharged a rule which they had granted, to shew cause why there should not be a new trial. The Court holding, that the intention of the parties to the instrument being apparent, to contract for such service to be performed to the company as a fluctuating body: and the intervention of the trustees removing all legal and technical difficulties to such a contract made with, or suit instituted by, the company themselves as a natural body. *Metcalf* v. *Bruin*, 12 East, 400.

Bond to the governors of a society unincorporated, ceases after their incorporation.

But where a bond was given to A., B., C., &c., payable to them and their successors, as the governors of the Society of Musicians, conditioned to secure J. H.'s faithfully accounting with them and their successors, governors, &c., as their collector; afterwards the society was incorporated by letters patent, at which time J. H. had duly accounted for all monies collected by him; but after the incorporation, he received money for which he did not account: It was held, that the obligor of the bond was not liable for such default. *Dance* v. *Girdler*, 1 Bos. and Pull. 34. [See *ante*, 235, *et seq.* and *post*, 296.]

from time to time, and at all times, well and satisfactorily account for, and pay over and deliver to the said [*two partners*] (*c*), their executors and administrators, all and every sums and sum of money, and securities for money, goods, and effects whatsoever, which he the said [*principal*] shall receive for their (*d*), or either of their use, or which shall at any time or times be intrusted to his care by them the said [*two partners*] (*e*), or either of them, or by their, or either of their correspondents or customers, or others to whom they (*f*), or either of them, are or is, or shall or may be liable or accountable: *And* do not at any time embezzle, make away with, obliterate, deface, or in any wise injure any of the money, securities for money, books, papers, writings, goods, or effects of them the said [*two partners*] (*g*), or either of them, or of their, or either of their correspondents or customers, or others to whom they or either of them are, or is, or shall or may be, or

FAITHFUL SERVICE OF CLERK.

and that he shall not embezzle, &c.

(*c*) "or to the survivor of them, their or his executors or administrators, and other the persons or person who shall or may become partners or partner with them, or any or either of them, or their or his executors or administrators, all," &c., *ut supra.*

FOR FAITHFUL SERVICE AFTER ALTERATION IN FIRM.

(*d*) "their, any, or either," &c. *ut supra.*

(*e*) "or the survivor of them, their or his executors or administrators, or other the persons or person who shall or may become partners or partner with them, or any or either of them, or their or his executors or administrators, or by their, any, or either of their correspondents," &c. *ut supra.*

(*f*) "they, any, or either of them," &c. *ut supra.*

(*g*) "or the survivor of them, their or his executors or administrators, or other the persons or person who shall or may become partners or partner with them, or any, or either of them, or their or his executors or administrators, or of their, any, or either of their correspondents or customers, or others to whom they, any, or either of them are," &c. *ut supra.*

FAITHFUL SERVICE OF CLERK.

become liable or accountable (*h*); *Then*, and in such case, the above written obligation to be void and of no effect; otherwise to be and remain in full force and virtue.

Proviso, that sureties shall only be liable to a given amount.

PROVIDED ALWAYS *nevertheless, and it is hereby declared*, that the said [*two sureties*], or their respective heirs, executors, or administrators, are not separately, or individually, to be liable for more than 1000*l.* each, parcel of the said sum of 2000*l.*, mentioned in the said above written bond or obligation.

Attestation.

SEALED AND DELIVERED, by the above bound [*principal*], and [*two sureties*], in the presence of

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(*h*) Add indemnity clause, *ut ante*, 234, and 282, if it be the intention of the parties.

FIDELITY OF BANKERS' CHIEF CLERK.

BOND *to secure the Fidelity of Bankers' Chief Clerk.*

Obligation three to three.

BOND from [*clerk*] of, &c. gentleman, and [*two sureties*] of, &c. jointly and severally, to [*three partners*] of, &c. bankers and copartners, in the penal sum of pounds, *ut ante*, 179.

Recital of being bankers, and agreement to take principal as chief clerk, on having bond.

WHEREAS the said [*three partners*] do now carry on the business of bankers and negociators at aforesaid; and they have agreed to take the said [*clerk*], as their head or managing clerk in the said business; on having the security of the above written bond for his good conduct, with such condition as hereunder written.

Condition for faithful service;

NOW THEREFORE THE CONDITION of the above written obligation is such, that if the said [*clerk*] do and

shall, from time to time, while he shall continue in the service of the said [*three partners*] (*a*), as the head or managing clerk in their said banking house, diligently and faithfully serve them, and devote the whole of his time and attention to their business; and give such reasonable attendance at their banking-house at aforesaid, as they shall from time to time require: AND do and shall keep all their secrets, and inform them, and every of them, of all such letters, writings, papers, and occurrences whatsoever, as shall from time to time come to his knowledge respecting the said business: AND do and shall keep all the cash accounts, ledgers, books, deeds, writings, and papers belonging or relating to the said concern, in a proper and business-like manner; and regularly answer the letters of their correspondents: AND do and shall, from time to time, account for, and render to the said obligees, and every or any of them, all such cash, bills, notes, and other securities, as shall from time to time come, or without his wilful default might have come, to his hands: AND do not nor shall embezzle, conceal, or waste; nor permit (as far as in him lies) to be embezzled, concealed, or wasted by others, any of the property belonging to the said obligees, or any of them: And do and shall receive all the customers of the said banking-house with civility; and make up the notes or memorandums of their respective affairs when necessary: And do and shall (as far as in him lies) cause the inferior clerk or clerks of the said obligees to give full and due attendance at their said banking-house, and there to conduct and demean himself or themselves diligently and faithfully, and in an orderly manner: AND ALSO if the said [*clerk*] do and shall, in all other respects, diligently, skilfully, and faithfully demean and conduct himself as the head or managing clerk of the said [*three partners*], in their said banking-house: Then the above written obligation shall be void, but otherwise shall be in full force.

FIDELITY OF BANKERS' CHIEF CLERK.

for keeping bankers' secrets, and for informing them of all letters, &c.

for keeping all cash accounts, &c. and for answering letters:

for rendering to bankers cash, &c.

for not embezzling banker's property.

for receiving customers with civility:

for causing inferior clerks to give due attendance:

and for conducting himself in all other respects diligently.

(*a*) In case of the death of either of the partners, or either of them going out of the partnership, or a new partner taken in, a fresh bond should be taken. To obviate this, the variations, *ante*, 283, should be adopted. *Vide ante*, 236.

FIDELITY OF SERVANT IN TRADE.

BOND *for the good Behaviour of a* SERVANT IN A TRADE.

Obligation one to one.

BOND from [*surety*] of, &c., to [*master*] of, &c. bookseller, in the penal sum of 100*l.*, *ut ante*, 179.

Recital that master, at the request of surety, has agreed to take servant:

and that surety has agreed to give bond.

WHEREAS the above named [*master*], at the instance and request of the above named [*surety*], hath consented to take [*servant*], now residing with the said [*master*], as an hired servant in his above mentioned business of a bookseller, to continue with him as such for so long time as they, or the executors or administrators of the said [*master*], and the said [*servant*] (*a*), shall mutually agree upon; in consideration whereof the said [*surety*] hath agreed to become bound to the said [*master*] in the above mentioned sum of one hundred pounds, as a surety for the said [*servant*], in the faithful discharge of his duty to the said [*master*] as such his servant.

Condition to indemnify master from all losses, &c. by reason of employing servant.

NOW THE CONDITION of the above written bond or obligation is such, that if the said [*surety*], his heirs, executors, or administrators, or any of them, shall and do from time to time, and at all times hereafter, well and sufficiently save, defend, keep harmless, lossless, and indemnified, the said [*master*], his heirs, executors, and administrators, and his and their goods and chattels, lands and tenements, of, from, and against all loss, costs, charges, damages, and expenses, which may be brought upon, happen to, or be sustained by him the said [*master*],

(*a*) Surety for the fidelity of a servant to a sole trader, does not extend to a subsequent partnership: *Wright* v. *Russell*, 2 Wm. Bla. 934; 3 Wils. 530; *ante*, 237. If it be intended that the guaranty should extend to service under a partnership, *vide* the requisite variation, *ante*, 232, 281.

his heirs, executors, or administrators, by reason, or on account of the said [*master*] taking the said [*servant*] into, or employing him in his said business; or for, or by reason, or on account of any mismanagement, misusage, embezzlement, loss, neglect, default, or procurement of, from, or by the said [*servant*], in, from, out of, or to any book or books, stationery, wares, money, bills, bonds, securities, or other property, effects, or things, which shall from time to time, or at any time or times, be intrusted with him the said [*servant*], by the said [*master*], his executors or administrators; or come into or under his the said [*servant*]'s hands, custody, possession, management, controul, or power, in the course of business, or as the servant of the said [*master*], his executors or administrators: or otherwise howsoever; *Then* the above written obligation to be void; otherwise to be and remain in full force and virtue.

FIDELITY OF SERVANT IN TRADE.

BOND *that neither the Obligor nor his Wife, who are to be employed as Servants, in carrying on an Art invented for copying any Picture or Print, will disclose the Secrets thereof* (*a*).

BY SERVANT, NOT TO DISCLOSE AN INVENTION.

BOND from [*servant*] of, &c. to [*two obligees*], of, &c. in the penalty of 3000*l.*, *ut ante*, 179.

Obligation one to two.

WHEREAS the above named [*inventor*] hath lately found out or discovered a new art, to which he hath given

Recital of having invented an art for copying

(*a*) Where a bill was brought for the specific performance of an agreement, for the sale of a goodwill of a trade, and of a secret in dying, it appeared that the plaintiff had for many years carried on the trade of a dyer in Spitalfields, and had a particular mode of dying bombazeens and stuffs. None but himself and his son-in-law, one Portlock,

A trader may sell a secret in his trade, and restrain himself generally from the use of it. Specific per-

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the name or title of Polyplosiasmos, by means of which he is able, not only to copy any picture or print in the colours thereof, so as to produce an exact or nearly an exact imitation and resemblance of the original; but to multiply, increase, or extend such copies to any given number: And which art, it is apprehended, will be found applicable to a variety of other purposes, and particularly to ornaments of various kinds, for the decoration of houses, public edifices, and other buildings: and which art, at present, promises to be capable of still further extension and improvement. AND WHEREAS the said [*inventor*] did some time since contract and agree to sell and dispose of, and did actually assign and set over to the said [*partner*], one equal undivided moiety, or half part of the said art; and of all improvement thereof, or therein; and of all the benefit, profit, emolument, and advantage to arise therefrom, and from such improvement: and did also contract, and agree to communicate to the said [*partner*] the secret of the said art (which he hath since done), and of all improvements that he should make therein. AND WHEREAS the said [*inventor*] and [*partner*], considering that the prosecution and exercise of the said art or invention, will be attended with considerable profits and advan-

any picture or print:

which it is apprehended, may be applied to a variety of other purposes:

that inventor has assigned one half of the art to a partner,

and hath communicated to him the secret:

and that they have agreed to join together to prosecute the same:

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formance decreed of an agreement to sell the good-will of a trade, and the exclusive use of a secret in dying.

knew the secret of dying stuffs in that mode; and this secret was esteemed of great value. In December, 1820, Bryson being about to retire from business, agreed to sell the good-will of his trade, together with the plant and fixtures, to the defendant, for 1,500*l.*, and the exclusive benefit of the secret, for 1,000*l.* Heads of the agreement in writing were signed by both parties, and were expressed as follows:—"Heads of agreement between Mr. Bryson of, &c. and Mr. John Whitehead of, &c. Mr. Bryson possesses a secret in the art of dying bombazeens, prince's stuffs, and other goods, which is known to himself and son-in-law, Samuel Portlock, only. Mr. Bryson is about to retire from his business, and therefore he has agreed with Mr. Whitehead as follows: Mr. Whitehead is to pay him, for himself and son, 1000*l.* for the secret, and 1,500*l.* for the plant and fixtures upon his premises, and for the good-will of the trade, and to have the premises leased or assigned at the following rents: [*then followed a description of the buildings, and the amount of the rent.*] Mr. Bryson, to make the secret known to Mr. Whitehead, and instruct him in the art, and to make

tage to them, have contracted and agreed with each other to associate and join themselves together, for the purpose of prosecuting and exercising the same; and in consideration of the mutual good opinion which they have of each other, have agreed to continue as such associates with each other, in the prosecuting and exercising of the said art, and the future improvement thereof, and in all things incident and belonging thereto, for the term of years, to commence and be computed from the day of now last past: and in the same view they have also agreed with each other to take into their said association such other persons as they shall mutually approve of, on the payment of such sums, and upon such considerations, as they shall mutually determine on in that behalf; and to enter into proper articles with each other for effectuating their said agreement; and in the mean time, immediately to use and put into practice the said art or invention, for their mutual benefit, as such associates with each other. AND WHEREAS for the purpose of so practising and exercising the said art or invention, they have contracted and agreed to engage and employ as their servants or assistants, the above bounden [*servant*], and [ ] his wife, who will thereby unavoidably become

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and have agreed to continue as such associates for a term of years:

and to take other partners;

and to enter into articles for effectuating agreement:

and immediately to practise the art:

that they have agreed to employ servant and his wife, as assistants, who will thereby know the secret;

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over the trade and good-will, and use his endeavours to secure it to Mr. Whitehead, by circular letters, and other usual means; and he is not himself to engage in the business of a dyer for twenty-years; and he is to engage that his son-in-law will not divulge the secret, or engage in the business of a dyer, for the same term as Mr. Bryson; and that neither of them shall do any thing to prejudice Mr. Whitehead in the trade of Mr. Bryson, and in securing and continuing the business of the connections of Mr. Bryson: and he is to procure his son-in-law to enter into an engagement to the same effect to Mr. Whitehead: an inventory of the plant to be delivered, &c.; possession to be delivered to Mr. Whitehead on payment of the 1,000*l.* and a circular immediately issued; so that the trade may be continued in the usual manner, under the direction of Mr. W., with the assistance of Mr. Bryson, who is to divulge the secret, and instruct Mr. W. therein immediately after the payment of the 1,000*l.* The 1,500*l.* to be paid upon the leases, &c. being executed according to this agreement, which are to be executed within a month, or sooner: deeds and instruments, with full and proper

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acquainted with the secret of the said art or invention, or of some part or parts thereof; and therefore, for the security and indemnity of the said [*inventor*], and [*partner*], their executors, administrators, and assigns, against the disclosure or discovery of such secret or art, or any part or parts thereof, or any thing relating thereto, by the said [*servant*] and [ ] his wife, or either of them; and against their or either of their using or employing the said secret or art, for any other purpose than for the benefit of the said [*inventor*], and [*partner*], their executors, administrators, and assigns, he the said [*servant*] hath consented and agreed to enter into the above written obligation, conditioned as hereinafter mentioned.

and therefore, for security against the discovery, and against their using the secret for any other purpose otherwise than the benefit of proprietors, servant hath agreed to give bond.

Condition that neither servant nor his wife shall divulge secret, without proprietors' consent;

NOW THEREFORE THE CONDITION of the above written obligation is such, that if the said [*servant*] and [ ] his wife, or either of them, shall not nor do, at any time or times hereafter, by any means whatsoever, either directly or indirectly, or by any intentional communication, or otherwise, insinuate, divulge, discover, or make known unto any person or persons whomsoever, without the consent of the said [*inventor*], and [*partner*]

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clauses, to be prepared and executed upon the basis of this agreement, and the expense divided." Whitehead forthwith paid the 1000*l.* and was put into possession of the trade, and had the secret communicated to him. Bryson and his son-in-law soon afterwards executed a bond to Whitehead, in the common form, with a penalty of 2,000*l.*, reciting the agreement; and with the condition that they, or either of them, would not, for twenty years, in any manner, exercise the trade of dyers within the distance of fifty miles from Spitalfields; and would not at any time disclose the secret. Whitehead, however, thought that this bond (which was prepared by Bryson's solicitor) was not sufficiently restrictive; and that Bryson and his son might, at any time, without incurring any penalty, resume their trade at any time beyond the distance of fifty miles from London; as at Kidderminster, Norwich, or in Yorkshire, where bombazeens and stuffs are principally manufactured. For this reason he insisted on a deed of covenant more restrictive in its terms, and with clauses for liquidated damages, in case of breach of the agreement. Disputes arose in consequence, as to the terms of the

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their executors, administrators, or assigns, for that purpose, first had or obtained in writing under their respective hands, the said art or invention, herein before mentioned to have been discovered by the said [*inventor*] as aforesaid, or any improvement of, alteration, addition, or extension which hath already, or shall or may at any time or times hereafter be made thereof, therein, or thereto; or how, or in what manner, such art or invention, or any such improvement of, alteration in, addition to, or extension of the same art or invention, is, can, shall, or may be performed or done; or any matter or thing whatsoever relating thereto, which shall or may, directly or indirectly, lead to, or be followed by the discovery or disclosure thereof, or of any branch or particular thereof, or of the principle on which the same is performed, or whereby, or by reason or means whereof, any other person or persons shall or may be in any degree whatsoever enabled, or in any wise qualified or made capable to practise, perform, or execute the said art or invention, or any improvement of, alteration in, or addition to, or extension of the same, or any other art or invention in any wise resembling the same, or the practice whereof will, can, or may in any wise interfere with or

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deeds to be executed under the agreement, and Bryson filed this bill for a specific performance, and for payment of the 1,500*l.*

The counsel for the defendant submitted it to the judgment of the court, whether the agreement was of such a kind as could be carried into execution. It was the essence of the agreement, that neither Bryson nor his son-in-law should, for twenty years, carry on the trade of dyers. If, however, the agreement was to be acted on, so as to confine the restriction on exercising the trade to places within fifty miles from London, then the defendant would not have that benefit which he had stipulated for by the agreement; because the plaintiff, or his son-in-law, by removing to Norwich, or any other convenient situation beyond the distance of fifty miles, would come into direct competition with him. If considered as an agreement not to exercise the trade of a dyer anywhere for twenty years, it was void by the policy of law. *Mitchell* v. *Reynolds*, 1 P. W. 181. If, on the other hand,

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prejudice the said [*inventor*] and [*partner*], or either of them, their, or either of their executors, administrators, or assigns, in the use or practice of the said art or invention, so discovered by the said [*inventor*] as aforesaid, or any improvement, alteration, extension, or addition which shall or may, at any time or times hereafter, be made thereof, therein, or thereto: AND if the said [*servant*] and [ ] his wife, or either of them, shall not, nor do, at any time or times during their respective natural lives, follow, use, exercise, or practise the said art or invention, or any improvement of, alteration in, additions to, or extension of the same; or any branch or particular thereof; or any other art or invention in any wise resembling the same, or the practice thereof, which can, shall, or may in any wise interfere with, or prejudice the said [*inventor*] and [*partner*], or either of them, their, or either of their executors, administrators, or assigns, in the use or practice of the said art or invention, so discovered by the said [*inventor*] as aforesaid, or any improvement, alteration, addition, or extension, which shall or may, at any time or times hereafter, be made thereof, therein, or thereto, for the benefit of themselves, or either of them, or for the benefit or advantage of any other person

and that neither servant nor his wife shall practise the art.

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it was to be acted on so as to limit the restraint on carrying on the trade to the distance of fifty miles from London, the defendant would lose the benefit for which he had contracted.

The Vice-Chancellor, Sir John Leach, said, although the policy of law will not permit a general restraint of trade, yet a trader may sell a secret of business, and restrain himself generally from using that secret. Let the Master, in settling the deed which is to give effect to this agreement, introduce a general covenant to restrain the use of the secret for twenty years; and a limited covenant, in point of locality, as to carrying on the ordinary business of a dyer; both parties being willing that the agreement should be so modified.

The decree, therefore, referred it to the Master to settle a proper deed. *Bryson* v. *Whithead*, 1 Simons and Stuart, 74.

See further *ante*, Vol. I, 172, (*d*); *Chesman* v. *Moseley*, 1 Bro. Cas. Par. 234; *Shackle* v. *Baker*, 14 Ves. 468; *Harrison* v. *Gardner*, 2

or persons whomsoever, either by themselves, or in co-partnership or association with any other person or persons whomsoever; *Then*, the above written bond or obligation to be void; or otherwise shall be and remain in full force and virtue.

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Madd. 198; *Kennedy* v. *Lee*, 3 Meriv. 441; *Job* v. *Barker*, 2 Swanst. 253; and see there, note (*a*), 254. [*Newbery* v. *James*, 2 Meriv. 446. And see *post*, 439.]

BOND *from the Principal and Four Sureties, for the due Performance of the Offices of Assistant Overseer of the Poor* (*a*), *Collector of Taxes, &c. for the Collectors, &c. of a Parish, and Depositary of the Parish Books and Papers.*

FOR FIDELITY AS ASSISTANT OVERSEER, COLLECTOR OF TAXES, &C.

KNOW ALL MEN, BY THESE PRESENTS, *That We* [*principal*] of, &c. [*surety*] of, &c. [*surety*], of, &c. [*surety*] of, &c. and [*other surety*] of, &c. are held, and firmly bound to [*churchwarden*], of

Obligation to churchwardens and overseers,

(*a*) By the statute 59 Geo. III. c. 12. s. 7, it was enacted, "That it shall be lawful for the inhabitants of any parish in vestry assembled, to nominate and elect any discreet person or persons to be assistant overseer or overseers of the poor of such parish, and to determine and specify the duties to be by † or them executed and performed, and to fix such yearly salary for the execution of the said office as shall by such inhabitants in vestry be thought fit; and it shall be lawful for any two of his majesty's justices of the peace, and they are hereby empowered, by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elect-

Inhabitants in vestry may elect, and two justices may appoint assistant overseer with a salary.

† *sic.*

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in trust for a parish, from five, and any four, three, or two of them jointly, and each of them separately.

the parish of , in the said county of , and [*other churchwarden*], of the said parish of , churchwardens of the said parish of , and [*overseer*], of the said parish of , and [*other overseer*], of the said said parish of , overseers of the poor of the said parish of , *In trust* for the parishioners of the said parish of , in the penal sum of 1000*l.* of lawful money of Great Britain [and Ireland], to be paid to the said [*churchwardens and overseers*], or to their certain attorney, successors, or assigns: *For* which payment to be well and truly made, *We* bind ourselves, our heirs, executors, and administrators jointly; *And* any four (*b*) of us, separately and apart from the other of us, bind ourselves, our heirs, executors, and administrators jointly; *And* any three of us, separately, and apart from the others, and other of us, bind ourselves, our heirs, executors, and administrators jointly; *And* any two of us, separately, and apart from the others, and other of us, bind ourselves, our heirs, executors, and adminis-

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ed to be assistant overseer or overseers of the poor, for such purposes, and with such salary as shall have been fixed by the inhabitants in vestry; and such salary shall be paid out of the money raised for the relief of the poor, at such times and in such manner as shall have been agreed upon between the inhabitants in vestry and the respective persons so to be appointed; and every person to be so appointed assistant overseer shall be and he is hereby authorized and empowered to execute all such of the duties of the office of overseer of the poor, as shall in the warrant for his appointment be expressed, in like manner, and as fully to all intents and purposes, as the same may be executed by any ordinary overseer of the poor; and every person or persons so

Out of what money salary to be paid.

Continuance in office of such

Joint severance necessary, when more than two obligors.

(*b*) Without a joint severance of the obligation, two or more obligors cannot be jointly sued in the life of another joint, or joint and several obligor, if they plead in abatement, that there is another joint obligor. *Vide ante*, 182, and the references there.

trators jointly; *And* each of us, separately, and apart from the others, and other of us, bindeth himself, his heirs, executors, and administrators, severally, firmly by these presents; SEALED with our seals: DATED the day of , in the year of our Lord 18 .

FOR FIDELITY AS ASSISTANT OVERSEER, COLLECTOR OF TAXES, &c.

WHEREAS the concerns of the poor of the said parish of are under the management and direction of a select vestry, nominated and elected pursuant to the directions contained in an act of parliament, made and passed in the fifty-ninth year of the reign of his late Majesty King George the Third, entituled "*An act to amend the laws for the relief of the poor;*" and such select vestry consists of the above named churchwardens and overseers, and twelve of the other principal inhabitants of the said parish of . AND WHEREAS at a general vestry of the inhabitants of the said parish of , duly held and assembled on the day of last, pursuant to the directions contained in an act of parliament, made and passed in the fifty-eighth year of the reign of his late Majesty King George the Third, entituled "*An act for the regulation of parish vestries,*" the said general vestry, by virtue of the said act of the fifty-ninth

Recital that the concerns of the poor are under the direction of a select vestry, pursuant to 59 Geo. 3, c. 12:

that at a general vestry, held pursuant to 58 Geo. 3, c. 69, s. 1., principal was elected assistant overseer,

by virtue of 59 G. 3, c. 12, s. 7:

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appointed shall continue to be an assistant overseer of the poor until he or they shall resign such office, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled, and no longer; and it shall be lawful for the inhabitants of any parish, upon the nomination and election by them of an assistant overseer or overseers, to require and take security for the faithful execution of his or their office, by bond, with or without a surety or sureties, and in such penalty as they shall think fit; and every such bond shall be made to the churchwardens and overseers of the poor, and may, on any breach of the condition thereof, be put in suit by and in the names of the churchwardens and overseers of the poor for the time being, by the direction of the vestry or select vestry, for the benefit of the parish, in the manner hereinafter provided."

assistant overseer.

surety may be taken.

The appointment of assistant overseer, clearly is not an annual office, and therefore the liability of the sureties is not restrained to

Observations on the above precedent, as

FOR FIDELITY AS ASSISTANT OVERSEER, COLLECTOR OF TAXES, &c.

year of his said late Majesty, nominated and elected the said [*principal*], to be assistant overseer of the said parish of : *And* did specify and determine, that he was so nominated and elected, in order to execute and perform the duties of collecting the poor rates of the said parish of ; and also such sums of money as were then, or might thereafter become due to the churchwardens and overseers of the poor of the same parish, from the mothers and reputed fathers of bastard children, born in the same parish; and also such sums of money as were then, or might thereafter become payable to the churchwardens and overseers of the poor of the same parish, for monies advanced by them, for, or towards the support of the poor belonging to any other parish, township, or place, who resided, or might reside, within the said parish of ; and also, such other sums of money as were then, or might thereafter become due, and payable to the churchwardens and overseers of the poor of the same parish, on any other account whatsoever. AND *it was*, at the said general vestry, *Resolved*, that the yearly salary to be paid to the said [*principal*], for the execution of his said office, should be fixed at the yearly sum of pounds: *And* that the said [*principal*] should continue to be an assistant overseer of the poor of the said parish

and the vestry specified, that he was so elected, in order to execute the duties of collecting the poor rates, &c.

and the vestry resolved, that his yearly salary should be £

that he should be assistant overseer, until

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contra-distinguished from decided cases.

the current year, as it was held to be in the following cases. The appointment to the offices of under collector of taxes, &c. is distinguishable from the case next stated; for in the above precedent, the sureties expressly undertake to be responsible beyond the current year; but independently of that circumstance, the under collector is to remain in his office until he is removed, or resigns, whereas in the following case the collector was reappointed in the ensuing year.

Sureties for an annual parish officer, are not answerable for his deficiencies under a second appointment, without special words clearly expressing a more extensive liability.

Thus where A., B., and C. entered into a bond as sureties for D. and E., the condition of which bond recited that D. was on such a day appointed collector of the church-rate of the parish of S. S. by virtue of which office he was empowered to collect and receive all such monies as were rated and assessed on the inhabitants by virtue of the said rate, and for which he was accountable to the wardens of the grand account, and bound the sureties for D.'s duly accounting for all monies collected or received by him, on account of the above rate; as also on all and every other rate or rates thereafter to be made and col-

FOR FIDELITY AS ASSISTANT OVERSEER, COLLECTOR OF TAXES, &c.

he resigned, or his appointment revoked:

that he should procure four sureties, who should, with himself, become bound for the faithful execution of his office.

And the vestry resolved that he should be appointed collector of the highway assessment, church rate, assessed and land tax, &c.

of until he should resign such office, or until his appointment should be revoked by the inhabitants of the said parish of , in vestry assembled, and no longer: *And* that the said [*principal*] should procure four sufficient sureties, to the satisfaction of the said churchwardens and overseers of the poor; which said sureties should, with the said [*principal*], become bound in a bond, to the churchwardens and overseers of the poor of the said parish of , in the penal sum of 1000*l.* for the faithful execution of his said office. AND *it was*, at the said general vestry, *also Resolved*, that the said [*principal*] should also become, and be appointed collector of the assessments, for the repairs of the highways, in the said parish of ; and such other sums of money as might become due and payable to the surveyors of the highways for the time being, within the same parish; and also collector of the church rates of the said parish of ; and such other sums of money as might become due and payable to the churchwardens for the time being of the same parish: and also collector of the assessed taxes, and land tax, within the said parish of ; and such other sum or sums of money as might become due and payable to, or be required to be collected by, the collectors for the time being of the assessed taxes within the

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lected by him the said D.: the Court held, that the sureties were only answerable for D. in that single appointment, and not on his appointment in the ensuing year. *The Wardens of Saint Saviour's Southwark* v. *Bostock*, 2 Bos. and Pull. 175. *Vide ante*, 235, 239. *Lord Arlington* v. *Merricke*, 2 Saund. 411. *Liverpool Waterworks Company* v. *Atkinson*, 6 East, 507; 2 Smith, 654, S. C.

So where the principal is appointed to an annual parish office, his sureties are not answerable beyond the year, without special words, clearly expressing a more extensive liability. Thus, where a bond was made by the defendant's testator as surety for E., with a condition, reciting that E. had been, and still was, collector of the land-tax, and all other taxes and duties imposed by several acts of parliament on the inhabitants of the parish of C., by means whereof he received from the inhabitants divers sums of money, and conditioned for the due payment by E. from time to time, and at all times thereafter, to the receiver-general of taxes, &c.; all and every sum which he (E.) should from

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same parish. *And it was*, at the said general vestry, *also Resolved*, that the said [*principal*] should from time to time pay all such sums of money as he should collect, as such receiver as aforesaid, at the end of every days, from the time of receiving the same, into the hands of such banker or bankers, as a quorum of the selest vestry of the said parish of should from time to time appoint, to the credit of the respective persons or officers, for whose use, or on whose account, the same monies should respectively be collected; that is to say; the collections for the overseers of the poor, to their credit; the collections for the surveyors of the highways, to their credit; the collections for the churchwardens, to their credit; the collections on account of the assessed taxes, to the credit of the collectors thereof; the collections on account of the land tax, to the credit of the collectors thereof; and the collections on any other account, to the credit of a separate account, or of separate accounts: *And also*, that the said [*principal*] should, from time to time, deliver unto the churchwardens and overseers of the poor of the said parish of , for the time being, within seven days after being required so to do, by a quorum of the select vestry of the same parish for the time being, accounts in writing of all monies collected

that he should pay all money he should collect, into such bank as a quorum of the select vestry should appoint, to the credit of the respective officers on whose account the same should respectively be collected:

that he should deliver to the churchwardens and overseers, after request, accounts of all monies collected by him on account of the

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time to time collect and receive from the inhabitants of the parish, for or on account of any tax or taxes then imposed, or which should or might thereafter be imposed on them by any act of parliament; it was held to be confined to the current year for which E. was, at the date of the bond, collector; although it did not appear on the condition, that he was only appointed for a year, it being shewn by the defendant's plea, that the said office of collector was an annual office, and held as such by E. at the date of the bond, although by the replication, it appeared that E. held the office not only for that year, but from thence to the time of exhibiting plaintiff's bill. *Hassell* v. *Long*, 2 Maule and Selw. 363. In which case, Lord Ellenborough in delivering the judgment of the court, said, "The question for the opinion of the court is, whether under the condition of this bond the defendant's testator, as surety for E., was liable for the arrears of monies received by E., as such collector or receiver in any year subsequent to the year which expired in 1797; in the course of which, *viz.* on the 5th of De-

and received by him, the said [*principal*], for the use, or on account of the churchwardens and overseers of the poor, the surveyors of the highways, the churchwardens, and the collectors of the assessed taxes and the land tax of the said parish of , respectively, and also on any other account whatsoever, by virtue of his said appointment; *And* should pay the balance (if any) remaining in the hands of the said [*principal*], on each of the said accounts, unto such banker or bankers, as aforesaid, within the space of three days then next following, to the credit of the respective persons for whose use, or on whose account, the same monies should have been collected. AND, at the said general vestry, *it was*, by virtue of the said act passed in the fifty-eighth year of the reign of his said late Majesty, *Resolved and directed*, that as well the books by the same act directed to be provided and kept for the entry of the proceedings of vestries, as all former vestry books, and all rates and assessments, accounts and vouchers of the churchwardens, overseers of the poor, and surveyors of the highways, and other parish officers, and all certificates, orders of court and of justices, and other parish books, documents, writings, and public papers of the said parish of , (except the registry of marriages, baptisms, and burials,) should be kept by the said [*prin-*

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respective officers;

and pay the balance into the bank.

and by virtue of the 58 Geo. 3, c. 69, s. 6., the vestry resolved, that as well the books by that act directed to be kept for entering proceedings of vestries, as all former vestry books, rates, &c. should be kept by assistant overseer in the vestry room;

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cember, 1796, this bond was given. The recital, which is a proper key to its meaning, states that E. had been for some time, and then was collector and receiver of the land tax, &c., (that being an annual tax, and E., as a receiver, being an annual officer), by means whereof, that is, of being then collector and receiver of those duties, the said E. received and collected, that is, then received and collected, divers sums. It is to be observed, that in this recital not one word occurs, describing an act, or intimating a receipt, beyond the limits of the then current year of collection. The words alone from which an inference is to be collected, are to be found in the condition, *viz.* "all and every sum of money which he the said J. E. should or might, from time to time, receive from the inhabitants of C., on account of any taxes then imposed, or *which should or might thereafter be imposed* on them by any act of parliament." Here is an express mention of duties *thereafter* to be imposed; which shews, (as it is contended for the plaintiffs), that the surety meant to continue his responsibility beyond the

or in such other place as quorum of select vestry should be directed.

cipal], and deposited in the vestry room of the said parish of , or in such other place or places, as by a quorum of the select vestry, for the time being, of the same parish, should from time to time be directed. And *it was*, at the said general vestry, *also Resolved*, that the condition on which the said [*principal*] should be appointed to his said offices and employments, should be, that he should execute the duties thereof faithfully and assiduously; and not engage in any other business or employment whatsoever; nor resign his said offices or employments, or any of them, without giving one calendar month's previous notice, in writing, to the churchwardens and overseers of the poor of the said parish of of his intention so to do: *And* that the persons who should become sureties for the due execution and performance of the office of assistant overseer of the same parish, by him the said [*principal*], should also become sureties for his faithfully performing and executing the other offices and employments hereinbefore mentioned. And whereas the said [*principal*] hath accepted the said offices or employments, and hath agreed to execute and perform the duties thereof, in consideration of the said salary of pounds, as assistant overseer of the poor, and also in consideration of being allowed to retain, and take for his own

And the vestry resolved that the condition on which he was appointed to his offices was, that he should execute the duties faithfully; and not engage in any other business; nor resign without giving notice: and that the persons who should become sureties for his due execution of office of assistant overseer, should also become sureties for his faithfully executing the other offices.

Recital that principal hath accepted, and agreed to execute

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period of the current year; inasmuch as it could not be supposed probable that any duties would be imposed, so as to come into collection, between the 5th of December and the 5th of April following. On the construction of this part of the condition, the whole question turns. Assuming it to be improbable, that taxes should be imposed between the times above stated, still it was not impossible; and the words might have been introduced *ex abundanti cautelâ*; and certainly they do not necessarily import that the duties should be collected by him after the expiration of the current year. And the words of the recital, which afford the best ground for gathering the meaning of the parties, do not advert to any such collection. Besides, as the consequence of giving to the condition a more enlarged construction, so as to extend the responsibility beyond the current year, would be of so grievous and burdensome a nature, we think it requires more clear and certain words than are to be found in this instrument. If the bond may continue beyond the current year, it may do so for the life of the

use and benefit, the poundage or per centage allowed to collectors of assessed taxes and land tax. And whereas the above bounden [*four sureties*] have agreed to join with the said [*principal*] in the above written bond or obligation, subject to the conditions hereunder written, as the sureties of the said [*principal*], for his due and punctual observance of the duties of his said offices or employments; and for his making such payments, and doing and performing such other acts and things, during his continuance in the said offices or employments, not only during the current year, but also in every and all future year and years, as are hereinafter mentioned. And the above named churchwardens and overseers of the poor have accepted the said [*four sureties*], as sufficient sureties for the said [*principal*], pursuant to the resolutions of the said general vestry. And whereas, by a warrant under the hands and seals of and , two of his Majesty's justices of the peace for the said county of , bearing date on or about the day of 18 , they the said and have, by virtue and in pursuance of the said act passed in the fifty-ninth year of the reign of his said late Majesty, appointed the said [*principal*] to be assistant overseer of the poor of the said parish of , for the pur-

FOR FIDELITY OF ASSISTANT OVERSEER, COLLECTOR OF TAXES, &c.

offices, in consideration of salary as assistant overseer, and of being allowed the poundage paid to collectors of assessed and land tax: that sureties have agreed to join in bond, as his sureties; and churchwardens and overseers have accepted them as sufficient sureties; that magistrates, by their warrant, have appointed principal to be assistant overseer.

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collector, during the whole period of his remaining in office; it will attach on the surety whenever the person for whom he undertakes is in default; and we know of no means subsisting at common law, by which the surety can redeem himself from this interminable risk. All the cases from Lord *Arlington* v. *Merricke*, to the last case of *St. Saviour's* v. *Bostock*, in 2 N. Rep. 175, have narrowed the construction of conditions of this sort, to the actual term of the office. The difference to be found in the words of the condition in this case is not, we think, such as will warrant us, in fair construction, to extend the limits of this responsibility beyond those of the former cases. In conformity with those cases we are of opinion, therefore, that the condition of this bond does not extend the responsibility of the surety for the receiver, beyond the current year of his office."

[So also where the condition of a bond from a collector of poors-rates, was for the due accounting to the obligees (the then churchwardens and overseers), *or to their successors*, it was held that the liability of the obligor must be narrowed by the nature of the appointment,

FOR FIDELITY AS ASSISTANT OVERSEER, COLLECTOR OF TAXES, &c.

poses, and with such salary, as are first hereinbefore mentioned.

Condition, that principal, while in his offices, duly collect the poor rates, &c.

NOW THEREFORE THE CONDITION of the above written bond or obligation is such, that if the said [*principal*] should from time to time, and at all times hereafter, during his continuance in the said offices, or employments, not only during the current year, but also during every and all future year and years, well, truly, and duly execute and perform the duties of collecting the poor rates, highway rates, assessed taxes, and land tax of the said parish of , and such other sum and sums of money as aforesaid: AND if the said [*principal*] should, from time to time, and at all times hereafter, well, truly, and duly pay, or cause to be paid, all such sums of money as he shall collect, as such receiver as aforesaid, at the end of every days from the time of receiving the same, into the hands of such banker or bankers as a quorum of the select vestry of the said parish of , shall, from time to time appoint, to the credit of the respective persons or officers, for whose use, or on whose account, the same monies shall respectively be collected in manner aforesaid: AND ALSO if the said [*principal*] should, from time to time, and at all times hereafter, deliver unto the churchwardens and overseers of the poor of the said parish

and duly pay the money he shall collect into such bank as quorum of select vestry shall appoint, to the credit of the respective officers:

and deliver to churchwardens and overseers, on request by

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and notwithstanding those words must be limited to the current year. *Leadley* v. *Evans*, 2 Bing. 32. *Ed.*]

The condition of a bond being larger than the recital, the recital shall restrain it.

A bond with one surety only, taken by commissioners of taxes under the 43d Geo. III. c. 99. s. 13, is not therefore void; the office of collector, under that act of parliament, is an annual office, and therefore, where a bond, after reciting the appointment of H. W. to be collector under that act, was conditioned for the due collection by H. W. of the rates and duties at all times thereafter; it was held that the due collection of the rates for one year was a compliance with the condition of the bond: and although it appeared from the condition of the bond, that H. W. and G. P. were both appointed collectors, it was held that such bond, being for the due collection by H. W. only, might be put in suit against the surety, without first selling the goods of G. P. *Peppin* v. *Cooper*, 2 Barnw. and Ald. 431. [And see *ante*, 235.]

Where the parish office is not annual, and the

The circumstances of the above precedent appear to be very much like the following case, where in debt on bond, made by C. and his sureties,

FOR FIDELITY AS ASSISTANT OVERSEER, COLLECTOR OF TAXES, &c.

of , for the time being, within seven days after being required so to do, by a quorum of the select vestry of the same parish, for the time being, an account in writing of all monies collected and received by him, the said [*principal*], for the use, or on account of the churchwardens and overseers of the poor, the surveyors of the highways, the churchwardens, and the collectors of the assessed taxes, and the land tax of the said parish of , respectively, and also on any other account whatsoever, by virtue of his said appointment; *And* should pay the balance (if any) remaining in the hands of the said [*principal*], on each of the said accounts, unto such banker or bankers as aforesaid, within the space of three days, then next following, to the credit of the respective persons for whose use, or on whose account, the same monies shall have been collected: AND ALSO if the said [*principal*] should well and truly keep and preserve every book, rate, assessment, account, voucher, certificate, order, document, writing, or paper, delivered into his hands or custody by virtue of his said appointment, under the said act passed in the fifty-eighth year of the reign of his said late Majesty; *And* should not wilfully, or negligently destroy, obliterate, or injure the same, or suffer the same to be destroyed, obliterated, or injured;

quorum of select vestry, an account of all monies received by him for the poor, &c.

and pay the balance on each of the accounts into bank, to the credit of the respective officers:

and keep and preserve every book, rate, &c. delivered to his custody, and not wilfully destroy, &c. same;

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with a condition, reciting stat. 27 Geo II. c. 38., intituled, "An act for the better relief and employment of the poor of the parish of Saint Nicholas, Deptford, and Saint Paul, Deptford, and for repairing the highways," &c. the churchwardens and parishioners of the respective parishes were, in manner therein mentioned, directed to choose and appoint one or more fit person or persons to be collector or collectors of the rates to be assessed, raised, and levied by virtue of the said act, in each parish; and that the said churchwardens and parishioners of the respective parishes were thereby required to take such security of such collector or collectors so by them appointed, for the faithful accounting for all such monies as he or they should receive by virtue of his or their office, as to the said churchwardens and parishioners of the respective parishes, or the major part of them, so assembled, should appear a sufficient security for the monies to be received by the said collector or collectors, from time to time; and also reciting, that C. (four years before the date of the bond) was appointed by the churchwardens and parish-

words of the bond are general, the sureties' liability is not confined to the current year.

FOR FIDELITY AS ASSISTANT OVERSEER, COLLECTOR OF TAXES, &c.

and not after notice and demand neglect to deliver same;

and while in offices, faithfully execute the duties thereof; and not engage in any other business;

and not resign his office without giving notice.

And should not, after reasonable notice and demand, refuse or neglect to deliver the same to such person or persons, or to deposit the same in such place as shall by the order of any general vestry of the said parish of , be directed: And if the said [*principal*] should, from time to time, and at all times hereafter, during his continuance in the said offices and employments, well, truly, and duly, faithfully, and assiduously execute the duties thereof; and not engage in any other business or employment whatsoever; *And* should not resign his said offices or employments, or any of them, without giving one calendar month's previous notice in writing, to the churchwardens and overseers of the poor of the said parish of , of his intention so to do; *Then* the above written bond or obligation shall be void, and of no effect; but otherwise shall be and remain in full force and virtue.

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ioners of D., in pursuance of the statute, collector of the poor rates *to be levied and raised* in the parish; and conditioned that C. should account, as often as required, for all monies *so collected and received by him, by virtue of the act, &c.* Breach for not accounting for monies collected and received since the making of the bond, &c. Plea, that C. accounted for all the monies collected and received by him before the making of the bond: secondly, that the office of collector is an annual office, and that C. accounted for all the monies collected and received by him within the current year of office in which the bond was made; but upon demurrer, it was held, that both pleas were ill, for by the words of the statute, the appointment is prospective, to collect future rates, and not retrospective only, and the condition is in the words of the statute, without any restraining words; and it is not pleaded that the office was an annual office at the time of making the bond, and if it had been, yet it appears by the statute not to be an annual office, though concerning rates which are raised in the course of a year. *Curling* v. *Chalklen*, 3 Maule and Selw. 502. [And see *ante*, 235, *et seq.* and 283.]

FROM TRUSTEES OF ASSURANCE SOCIETY.

BOND *from Three Trustees of an Assurance* (*a*) *Society, to the Treasurer, for duly applying the Funds of the Society, according to the Directions of the Court of Directors;* AND *to permit Suits or Actions to be brought in their Names, for Monies due to them, as Trustees for the Society, without becoming Nonsuit, &c.*

Obligation from three to one, jointly and severally.

BOND from [*three trustees*] of, &c. to [*treasurer*] of, &c. in the sum of six thousand pounds, jointly and severally, *ut ante*, 179.

Recital that an assurance society is established, and conducted under the regulations of a deed, and rules made by the members:

WHEREAS a society is now subsisting, commonly called or known by the name of the Assurance Society; and which society was established under, and by virtue, and in manner, and subject to the regulations mentioned in a certain deed, bearing date the of 17 , and enrolled in his Majesty's Court of King's Bench: *And* which said society doth now continue to be conducted under, and by virtue of the same deed, and the rules and regulations therein mentioned, and such other rules and regulations as have been made and agreed upon by the members thereof.

that the obligors have been elected trustees for the society:

AND WHEREAS the above bounden [*three trustees*] have been elected, and chosen three of the trustees for the said society, pursuant to, and in the manner prescribed by the said deed inrolled, and the bye laws, rules, orders, and regulations of the same society.

that the trustees have agreed to give a bond for fidelity in their office:

AND WHEREAS the said [*three trustees*] have agreed to enter into a bond or obligation to the said [*treasurer*], who hath been appointed the treasurer to the said society, for the due application of the money which may come to their hands, as such trustees as aforesaid; and for permitting actions to be commenced and prosecuted in their, or in any of their names, for the recovery of any sum or sums of money, due or owing to them, or any of

(*a*) The above form is equally applicable where the trustees are for any other society, company, or extensive copartnership.

The above form is applicable to other purposes.

FROM TRUSTEES OF ASSURANCE SOCIETY.

them, as trustees for, and on behalf of the said society; and for other the purposes mentioned in the condition hereinafter contained.

Condition to sell out stock standing in their names in trust for the society, when required by the directors:

NOW THE CONDITION of the above written obligation is such, that if the above bounden [*three trustees*] shall and do, at all and every times or time hereafter, when called upon, demanded, or required by the Court of Directors of the aforesaid Assurance Society, for the time being, appointed and called together, pursuant to the rules and regulations of the same society; or by any order of the said court of directors, or the major part of them, assembled at any of their general or extra meetings, held pursuant to the rules and regulations of the said society, sell out and dispose of, all or such part of such stock or stocks of money or monies as they, and each or either of them, jointly or severally may be intrusted with for the use and benefit of the said society, as may at that time stand in their names, or in either or any of their names, jointly or severally, in any of the public funds, in the Bank of England, East India stock, South Sea stock, or otherwise, in trust for the said society: AND shall and do well and truly pay the money or monies arising from so disposing of, or selling out of, all or such part of such stock or stocks, money or monies, so intrusted with them, or each or either of them jointly or severally, for the use and benefit of the said society, to such person or persons, and in such manner and form, as they the said court of directors, or the major part of them, assembled at any of their general or extra meetings as aforesaid, may order and direct: OR shall and do, at all and every times and time hereafter, when called upon, demanded, or required by the said court of directors of the said society for the time being, or when by any order of the said court of directors, or the major part of them, assembled at any of their said general or extra meetings, transfer and set over, all and singular such stock or stocks, money or monies, as they, or each, or either, or any of them may jointly or severally hold in trust for the said society, in any of the public funds, in the Bank of England, East India stock, South Sea stock, or otherwise, to such person or persons as they the said court of directors

to pay the money arising therefrom, as directors shall order:

or when required, transfer stock, held by them in trust for the society, as directors shall order;

FROM TRUSTEES OF ASSURANCE SOCIETY.

for the time being, or the major part of them, assembled as aforesaid, shall and may order and direct; OR shall transfer and set over to such person or persons, such part or parts of such stock or stocks, money or monies, as they the said court of directors for the time being, assembled as aforesaid, shall or may order and direct: AND shall and do also, at all and every times and time hereafter, when ordered, demanded, or required by the said court of directors of the said society for the time being, or the major part of them, assembled at any of their general or extra meetings, deliver up, transfer, and set over, all and singular such deeds, bonds, bills, notes, or other papers, or writings, as they, or each, or any of them, may jointly or severally hold in trust for, or for the benefit of the said society, to such person or persons as they the said court of directors for the time being, or the major part of them, as aforesaid, shall appoint to receive the same: AND shall and do, at all and every times and time hereafter, when so ordered, demanded, or required, as aforesaid, and at the costs and charges in the law of the said society, seal and execute such good and sufficient assignment or assignments in the law, of all and singular such deeds, bonds, bills, notes, or other papers or writings, and of all such other the premises relating thereto; *And* of all their right, title, benefit, and interest therein, and of the premises any ways relating thereto, to such person or persons as they the said court of directors for the time being, or the major part of them, as aforesaid, shall appoint, freed and discharged of and from all incumbrances done or committed by them, or any or either of them, without the order or direction of the said court of directors for the time being, or the major part of them, as aforesaid, in such manner and form, and by such deed or deeds, assignment or assignments, as by the said court of directors for the time being, or the major part of them, as aforesaid, or their counsel, learned in the law, shall be reasonably devised, advised or required: AND shall also well, truly, and faithfully, at all and every times or time hereafter, pay into the hands of the then treasurer of the said society for the time being, all and every the dividends, interest, and profits, of such money or monies as shall by them be placed out at interest in any of the public

or transfer such part of such stock, as they shall order:

to deliver, and transfer all such deeds, bonds, &c. held in trust for the society, as the director shall appoint:

and when so ordered, to assign all such deeds, bonds, &c. as directors shall appoint:

to pay treasurer all dividends, &c. as they shall be received:

FROM TRUSTEES OF ASSURANCE SOCIETY.

funds, in the Bank of England, East India stock, South Sea stock, or any other security or securities whatsoever, in trust for the said society, as the same shall arise and become due, or shall come to the hands of them the said [*three trustees*], or to any or either of them, jointly or severally, for the use and benefit of the said society: AND also shall and do permit and suffer any suit or action, or suits or actions, which may be directed in manner aforesaid, at any such general or extra meeting, as aforesaid, to be brought, commenced, and prosecuted in their, or any of their names, for the recovery of any sum or sums of money which shall or may be due or owing to them, or any of them, as trustees for the said society, without becoming nonsuit therein, or otherwise delaying, releasing, compounding, or barring the same; *Then* the above written obligation to be void, and of no effect; but otherwise the same shall be and remain in full force and virtue.

and to permit suits or actions to be brought in their names, for monies due to them as trustees for the society, without becoming nonsuit, &c.

FROM TREASURER OF ASSURANCE SOCIETY.

BOND *from the Treasurer of an Assurance Society, to the Trustees, for duly applying the Monies of the Society which shall come to his Hands; And to permit Suits or Actions to be brought in his Name, for Monies due to him as Treasurer, without becoming Nonsuit, &c.; And to observe the Rules and Regulations of the Society, which he ought to perform as Treasurer.*

Obligation from one to twelve, as joint tenants.

BOND from [*treasurer*] of, &c. to [*the whole body of trustees describing each*], of, &c., in the penalty of 2,000*l. ut ante*, 179.

Recital.

WHEREAS (*recite as in the preceding bond*), mutatis mutandis.)

Condition to apply sums received as treasurer, according to the rules of the society:

NOW THE CONDITION of the above written obligation is such, that if the said [*treasurer*] shall and do, from time to time, and at all times hereafter, pay, and apply all such sum and sums of money as shall be received

by him, as such treasurer as aforesaid, in the manner mentioned and prescribed by the said deed, and by such subsequent rules, orders, and regulations, as have been, or shall or may hereafter be made, by the Court of Directors of the aforesaid Assurance Society, for the time being, or the major part of them, when assembled at any of their general or extra meetings, held pursuant to the rules and regulations of the said society: AND shall and do also, at all and every times and time hereafter, when ordered, demanded, or required by the said court of directors of the said society for the time being, or the major part of them, assembled at any of their general or extra meetings, deliver up, transfer, and set over, all and singular such deeds, bonds, bills, notes, or other papers or writings, as he the said [*treasurer*] may hold in trust for, or for the benefit of the said society, to such person or persons, as the said court of directors for the time being, or the major part of them as aforesaid, shall appoint to receive the same: AND shall and do, at all and every times and time hereafter, when so ordered, demanded, or required as aforesaid, and at the costs and charges in the law of the said society, seal and execute such good and sufficient assignment or assignments in the law, of all and singular such deeds, bonds, bills, notes, or other papers or writings made to, or taken in the name of the said [*treasurer*], in trust for, or for the benefit of the said society; *And* of all such premises as relate thereto; *And* of all his right, title, benefit, and interest therein, and of the premises in anywise relating thereto, to such person or persons, as they the said court of directors for the time being, or the major part of them as aforesaid, shall appoint; freed, and discharged of, from, and against all incumbrances, done or committed by him without the order or direction of the said court of directors for the time being, or the major part of them, as aforesaid, in such manner and form, and by such deed or deeds, assignment or assignments, as by the said court of directors for the time being, or the major part of them, as aforesaid, or their counsel learned in the law, shall be reasonably devised, or advised, or required: AND ALSO if the said [*treasurer*], his heirs, executors, or administrators, shall and do permit and suffer,

FROM TREASURER OF ASSURANCE SOCIETY.

when ordered by the directors, to deliver and transfer such deeds, bonds, &c. as he shall hold as treasurer:

and when so ordered, to execute assignments of such deeds, bonds, &c.

to permit suits or actions to be brought in the

FROM TREASURER OF ASSURANCE SOCIETY.

any suit or action, or suits or actions, which may be directed in manner aforesaid, at any such general or extra meeting, as aforesaid, to be brought, commenced, and prosecuted in his, their, or either of their name or names, for the recovery of any sum or sums of money, which shall or may be due or owing to the said [*treasurer*], as treasurer of the said society, or his heirs, executors, or administrators; or for any other cause, matter, or thing whatsoever, in any wise relating to the affairs of the said society, without becoming nonsuit therein, or otherwise delaying, releasing, compounding, or barring the same: AND shall and do, from time to time, and at all times hereafter, well and truly observe, perform, fulfil, and keep, all and singular the rules and regulations mentioned and contained in the said deed, so inrolled as aforesaid, so far as the same remain unaltered; And all such other rules, orders, and regulations, which have since been made, or which shall or may, from time to time hereafter, be made by the same society, and which it is, or shall or may be incumbent upon him to perform, as treasurer of the said society; *Then* the above written obligation to be void; but otherwise the same shall be and remain in full force and virtue.

names of treasurer, his heirs, &c. without becoming nonsuit, &c.

and to perform all the regulations of the society, which he ought to perform as treasurer.

TO GRANT A LEASE.

BOND *by a Tenant for Life, who had Power to lease only for Twelve Years, but who had contracted* TO GRANT A LEASE *for Twenty-one Years, that at the end of Twelve Years for which a Lease had been granted, the immediate Reversioner should, upon the Lessee's Request, grant another Lease for Nine Years, at the same Rent, and under the same Covenants, as was contained in the Lease for Twelve Years.*

Obligation one to one.

BOND from [*lessor*] of, &c. to [*lessee*] of, &c. in the penal sum of pounds, *ut ante*, 179.

Recital of contract to grant lease of farm

WHEREAS the above bounden [*lessor*], lately contracted and agreed with the above named [*lessee*], to grant him a

lease of *All that* farm house, messuages, lands, and hereditaments, situate in the parish of in the said county of and commonly called the farm, with the appurtenances, for the term of twenty-one years, from the eleventh day of October last, at the yearly rent of pounds; but by the will of [*testator*], late of &c. deceased, under which the said [*lessor*] derives his title to the said premises, a lease thereof granted by him, for a longer term than twelve years, would determine by his death: *And* therefore, he hath by an indenture, bearing even date with the above written obligation, demised the said premises to the said [*lessee*], for the term of twelve years, from the said eleventh day of October; *And* hath agreed, that if at the expiration of that term, the person or persons then entitled to the immediate reversion of the said premises, shall not, upon the request of the said [*lessee*], his executors or administrators, grant to him or them, another lease of the said premises, for a further term of nine years, from the expiration of the lease already granted thereof, as aforesaid; and at the same rent, and under the same covenants, as are contained in that lease; then the said [*lessor*], his executors or administrators, shall or will forthwith pay to the said [*lessee*], his executors or administrators, the sum of pounds, as liquidated damages, for the loss of the residue of the term of twenty-one years in the said premises originally contracted for, as aforesaid.

TO GRANT A LEASE.

for twenty-one years;

but a lease for more than twelve years would determine on lessor's death:

demise for twelve years;

and agreement that if at expiration reversioner should not, on lessee's request, grant another lease for nine years, under same rent and covenants, then lessor to pay liquidated damages.

NOW THEREFORE, THE CONDITION of the said obligation is such, *That* in case, at the expiration of the lease already granted of the said premises, as aforesaid, the person or persons who shall then be entitled to the immediate reversion thereof, shall not, upon the request of the said [*lessee*], his executors or administrators, grant to him or them another lease of the said premises, for the said further term of nine years, at the rent and under the covenants aforesaid, then if the said [*lessor*], his executors or administrators, shall upon demand, pay to the said [*lessee*], his executors or administrators, the said sum of pounds, the said obligation shall thereupon become and be void; but otherwise, shall remain in full force.

Condition that reversioner shall grant lease accordingly.

FOR PERFORMANCE OF CONTRACT FOR SALE OF INFANT'S ESTATE.

BOND *for Performance of a Contract for Sale of an Infant's Estate in Fee* (*a*).

Obligation two to one jointly and severally.

KNOW ALL MEN, BY THESE PRESENTS, *That We*, [*vendor*] of, &c. esquire, and [*other vendor*] of, &c. widow, are held and firmly bound to [*purchaser*] of, &c. in the sum of 8000*l.* of lawful money of Great Britain [and Ireland]; to be paid to the said [*purchaser*], or his certain attorney, executors, administrators, or assigns: *For* the true payment whereof we bind ourselves, and each of us by himself and herself, for the whole and every part thereof, our, and each of our heirs, executors, and administrators, and every of them, jointly and severally, firmly by these presents; *Sealed* with our seals: DATED the day of 18 .

Recital of contract.

Recital of assignment of mortgage term, and mortgage money, to purchaser;

WHEREAS by articles of agreement (*recite the agreement* Vol. I. 94, *very fully to the end.*) AND WHEREAS in pursuance of the said recited articles of agreement, the said [*assignee of mortgagee*] did, on the tenth day of this present month of October, execute an assignment of the said mortgage term of two thousand years, and of the said sum of 2800*l.* thereby secured as aforesaid, unto the said [*purchaser*]; and the said [*purchaser*] did, on the said tenth day of this same month of October, pay unto the said [*assignee of mortgagee*] the said sum of 2800*l.*, as the consideration of such assignment; and did pay unto the said [*vendor*], and [*other vendor*], the said sum of 200*l.*, in part of the said purchase money of 6000*l.* as aforesaid.

payment by purchaser of mortgage money;

and his payment of part of purchase money to vendors:

agreement that vendors should execute a bond to purchaser, for securing payment of sum paid them, and liquidated damages, if in-

AND WHEREAS it hath been agreed, between the said [*two vendors*] and [*purchaser*], that the said [*two vendors*] should execute unto the said [*purchaser*], a bond, in a sufficient penalty, for securing to him the payment of the said sums of 200*l.* and 4000*l.*, pursuant to the said recited

(*a*) See the Agreement, Vol. I. 94.

articles of agreement, in the event of such refusal or neglect by the said [*infant*], the infant, or his heir or heirs at law, as hereinafter mentioned: AND in pursuance of the said agreement, the said [*two vendors*] have executed the above written bond; with such condition for making the same void, as hereinafter is mentioned.

FOR PERFORMANCE OF CONTRACT FOR SALE OF INFANT'S ESTATE.

fant or his heirs should refuse to convey:

NOW THE CONDITION of the above written obligation is such, that if the said [*infant*], the infant, for the space of six calendar months, next after he shall attain the age of twenty-one years, or (in case of his death in the mean time) if the heir or heirs at law of the said [*infant*], the infant, for the space of six calendar months next after he, she, or they, shall be capable by law to make and execute a conveyance of freehold hereditaments, shall refuse or neglect to make out a good title to, and execute a proper conveyance of the said messuages, lands, and hereditaments, and the inheritance thereof in fee simple, unto the said [*purchaser*], his heirs or assigns; such conveyance being prepared and tendered for execution by, and at the expense of the said [*purchaser*], his heirs or assigns; *Then*, and in either of the said cases, if they the said [*two vendors*], or one of them, their, or one of their heirs, executors, or administrators, shall immediately after such refusal or neglect, as aforesaid, well and truly repay, or cause to be repaid, unto the said [*purchaser*], his executors, administrators, or assigns, the said sum of 200*l.* of lawful money of Great Britain [and Ireland], so advanced and paid by the said [*purchaser*], as aforesaid; together with interest for the same, after the rate of five pounds per centum per annum, to be computed from the said tenth day of this present month of October, to the day on which the repayment of the said sum of 200*l.* shall be actually made: AND ALSO shall and do, immediately after such refusal or neglect, well and truly pay, or cause to be paid, unto the said [*purchaser*], his executors, administrators, or assigns, the further sum of 4000*l.* of lawful money of Great Britain [and Ireland]: OR if the said [*infant*], the infant, or his heir or heirs at law, shall, within the time aforesaid, make out such title, and execute such conveyance as aforesaid; *Then* the above written obligation shall

Condition that if infant or his heirs should, for six months after being capable, refuse to make a good title, and execute conveyance;

then if obligees should repay purchaser, sum paid in part of purchase money,

with interest;

and a further sum, by way of liquidated damages:

or if infant, or his heirs, should make out title and execute conveyance within

the time appointed: bond to be void.

be void and of no effect; otherwise shall be and remain in full force and virtue.

Attestation.

SEALED AND DELIVERED by the above-bound [*two vendors*], (being first duly stamped (*b*),) in the presence of

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Stamp.

(*b*) The *ad valorem* duty he should charged on 4,200*l.* 55 Geo. II. c. 184. tit. BOND.

TO PERFORM COVENANTS.

BOND *for the Performance of Covenants* (*a*).

Obligation one to one.

BOND from [*obligor*] of, &c. to [*obligee*] of, &c. in the sum of pounds, *ut ante*, 179.

Condition for performance of covenants in

THE CONDITION of this obligation is such, that if the above bounden [*obligor*], his heirs, executors, and ad-

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An action of covenant does not lie against a devisee under the statute of fraudulent devises, if only damages are recoverable; but it seems otherwise, where the covenant is to pay a sum certain.

(*a*) In *Wilson* v. *Knubley*, 7 East, 128, the Court of King's Bench held, that an action of covenant does not lie upon the statute of fraudulent devises, 3 Wm. and Mary, c. 14, against a devisee of land, to recover damages for a breach of covenant made by the devisor; the remedy thereby given being confined to cases where *debt* lies. An action of covenant does not lie at common law against a devisee for damages, by breach of his testator's covenant; and therefore, although a vendor die seised of real estates, yet if they are devised by his will, a purchaser will not have any remedy against the devisee, notwithstanding the covenants for title are broken, and there is no other fund to which he can resort for damages. A purchaser may, however, guard against the effect of a devise of the vendor's real estates, by taking a bond, conditioned to be void if the vendor is seised in fee and has good right to convey, &c. (following the words of the covenants in the deed, *mutatis mutandis*.) The penalty would be a *debt*, recoverable under the statute. Such a bond is scarcely ever taken at the present day. Sug.

ministrators, do and shall, from time to time, and at all times hereafter, well and truly observe, perform, and keep, all and singular the covenants and agreements, which on his and their part, are, or ought to be performed and kept, comprized, and mentioned in one indenture bearing even date herewith, and made or expressed to be made between the above named [*obligor*], of the one part, and the said [*obligee*], of the other part; *Then* this obligation to be void; otherwise to remain in full force and virtue.

TO PERFORM COVENANTS.

indenture of even date.

SEALED AND DELIVERED, (being first duly stamped (*b*),) in the presence of

Attestation.

Ven. 499, 5th ed.; 565, 6th ed. [584, 7th ed.] However, Mr. Fearne recommended a bond for performance of covenants, on the purchase of the *next* presentation to an advowson. Posthumous Work, 405.

But it seems, that where a covenant is to pay a sum certain, as it does not sound in damages, there an action of *debt* may be maintained on it, under the statute of fraudulent devises. *Vide ante*, Vol. II. 360. Therefore, if by the purchase deed the vendor covenants to pay the purchaser a certain sum by way of liquidated damages, if he is not seised in fee, and has not good right to convey, and if the purchaser should not peaceably enjoy, &c., then, it seems that an action of debt may be maintained against the covenantor's devisee, on breach of either of the covenants.

(*b*) Stamp, *one pound*. 55 Geo. III. c. 184, p. 1562.

Stamp.

TO PERFORM AGREEMENT.

BOND *for the Performance of an Agreement.*

Obligation one to one.

BOND from [*obligor*] of, &c. to [*obligee*] of, &c. in hundred pounds, *ut ante*, 179.

Condition for performance of an agreement of even date.

THE CONDITION of the above written obligation is such, that if the above bounden [*obligor*], his executors and administrators, shall and do, in and by all things whatsoever, for, and on his and their parts and behalfs, observe, perform, fulfil, and keep, all and singular the clauses, conditions, agreements, matters, and things, which on the part and behalf of the said [*obligor*], his executors or administrators, are, and ought to be observed, performed, fulfilled, and kept, according to a certain agreement in writing, bearing even date herewith, and made or expressed to be made between the said [*obligor*], of the one part, and the said [*obligee*], of the other part; *Then* the above written obligation shall be void; but otherwise shall remain in full force. (*a*)

(*a*) [Stamp, *ut ante*, 317, (*b*). See *Mounsee* v. *Stevenson*, 7 B. & C. 403; and *ante*, 202, n. (*c*).]

WITH SURETY, TO CONVEY LAND SOLD.

BOND *from two Vendors, and their Surety, to a Purchaser, for the Performance of the Vendor's Covenants to convey the Premises sold.*

Obligation three to one.

BOND from [*two vendors*] of, &c. and [*surety*] of, &c. to [*purchaser*] of, &c. jointly, and any two of them jointly, and each of them separately, in [*double the purchase money*] pounds, *ut ante*, 181.

Recital of contract for purchase:

WHEREAS the said [*purchaser*], hath contracted with the above bounden [*two vendors*], for the absolute purchase of a moiety or half part of a certain messuage, &c. and the fee simple and inheritance thereof, free from in-

cumbrances, at or for the price or sum of pounds. And in consideration thereof, the said [*two vendors*], by indenture bearing even date with the above written bond or obligation, and made between the said [*vendors*], of the one part, and the said [*purchaser*], of the other part, have entered into covenants, for the assurance of one moiety or half part of the said messuage, &c. unto the said [*purchaser*], his heirs and assigns, at the time, and in manner therein mentioned; and for the quiet enjoyment of the same moiety or half part, free from incumbrances, in the mean time, and until such conveyance or assurance shall be made thereof, in such manner as in the same indenture is also expressed. AND WHEREAS upon the treaty for such purchase, it was agreed between the said [*two vendors*], [*purchaser*], and [*surety*], that they the said [*two vendors*], together with the said [*surety*], as their surety, should enter into a bond, with a sufficient penalty; conditioned to be void, upon the due performance of the covenants contained in the said indenture, bearing even date herewith, on the part of them the said [*vendors*], as hereinafter mentioned.

WITH SURETY, TO CONVEY LAND SOLD.

indenture containing covenants to convey, and for quiet enjoyment in mean time:

and agreement for bond from vendors and surety, for performance of the covenants;

NOW THE CONDITION of the above written obligation is such, that if the above bounden [*two vendors*], and each of them, their, and each of their heirs, executors, and administrators, shall and do, from time to time, and at all times, well and truly observe, perform, fulfil, and keep all and every the covenants, articles, and agreements, mentioned and contained in the said indenture, bearing even date herewith; and which by them, or either of them, and on their, or either of their part and behalf, are or ought to be observed, performed, fulfilled, and kept, in all things, according to the purport, true intent, and meaning of the same indenture; *Then* the above written obligation shall be void; but otherwise shall remain in full force (*b*).

Condition for performance of covenants by vendors.

(*b*) Stamp, *ut ante*, 317, (*b*).

Stamp.

WITH TWO SURETIES, TO PERFORM CONTRACT FOR BUILDING, &c.

BOND *from Two Builders, and their Two Sureties, for the due Performance of a Contract for Building a School, and Altering and Repairing a House.*

Obligation to a trustee for the managers of parish schools, from two principals jointly and severally, with a separate lien part from two sureties severally, in an additional penalty.

KNOW ALL MEN BY THESE PRESENTS, *That We* [*two builders*], both of, &c. and each of us, are and is jointly and severally held, and firmly bound to [*trustee*] of, &c. (a trustee nominated by and on behalf of the managers of the schools of the parish of Saint George, Hanover Square, in the county of Middlesex), in the penal sum of one thousand pounds of lawful money of Great Britain [and Ireland]: AND *That* We [*surety*] of, &c. and [*other surety*] of, &c. (as the sureties of the said [*two builders*],) are severally and respectively held, and firmly bound to the said [*trustee*], in the penal sums of one thousand pounds each, of such lawful money as aforesaid: ALL the said several sums to be paid to the said [*trustee*], or his certain attorney or attornies, executors, administrators, or assigns: FOR which said payment to be well and truly made by us the said [*two builders*], *We*, the said [*two builders*], bind ourselves, jointly and severally, our, and each of our heirs, executors, and administrators, and every of them; *And* for which several payments, to be well and truly made by us the said [*two sureties*], respectively, We, the said [*two sureties*], respectively, bind ourselves respectively, and our respective heirs, executors, and administrators, and every of them, firmly by these presents; *Sealed* with our seals: DATED the day of 18 .

Recital of contract to erect and finish schools, and to alter and re-

WHEREAS the above bounden [*two builders*], have lately entered into a contract and agreement in writing, with the managers of the schools of the parish of Saint George, Ha-

WITH TWO SURETIES, TO PERFORM CONTRACT FOR BUILDING, &c.

nover Square, aforesaid, whereby they have contracted and agreed with the said managers to do the whole of the works, in erecting and completely finishing the buildings of an intended new school, with the privies, staircases, &c. attached thereto; and to make alterations and reparations in the present house in South Street, Grosvenor Square, belonging to the said managers, in every respect agreeably to the drawings, agreements, conditions, clauses, and particulars mentioned, specified, particularized, and contained in a certain paper or writing, intituled "A specimen of works," &c. at or for the price or sum of pounds. AND WHEREAS at the time of entering into such agreement as aforesaid, the said [*two builders*], and their said sureties, the said [*two sureties*], agreed to execute the above written bond or obligation, for the due performance of the several works so contracted to be done as aforesaid, according to the specification aforesaid.

pair a house, agreeably to specification:

and agreement that principals and sureties should give bond for due performance of contract.

NOW THEREFORE THE CONDITION of the above written bond or obligation is such, that if the above bounden [*two builders*], or either of them, or their, or any or either of their heirs, executors, or administrators, do and shall, within calendar months from the date of the above written bond or obligation, do, perform, execute, and completely finish, or cause to be done, performed, executed, and completely finished, all and singular the several erections, buildings, alterations, repairs, and other works mentioned, specified, and particularized in the hereinbefore mentioned specification, conformably to the same specification in all respects whatsoever, and in a good and workmanlike manner; *Then* the above written bond or obligation shall be void; but otherwise the same shall remain in full force and virtue.

Condition for due performance of contract.

TO PROCURE ASSIGNMENT OF TERM.

BOND *from a Vendor to a Purchaser, to procure an Assignment of an Outstanding Term.*

Obligation one to one.

BOND from [*vendor*] of, &c., to [*purchaser*] of, &c., in [*double the purchase money*] pounds, *ut ante*, 179.

Recital of contract; creation and assignment of term: that purchaser has agreed to complete his purchase, without at present requiring assignment of term;

and to accept vendor's bond to procure assignment within six months:

Recital of conveyance to purchaser.

WHEREAS, &c., (recite contract for purchase; *creation of term, and that it is outstanding*, ut ante, Vol. I, 117, 118; *and assignment of the term in trust for a purchaser, and to attend, &c.*, ut ante, Vol. II. 163.) AND WHEREAS the said [*purchaser*] hath, at the request of the said [*vendor*], agreed to complete his said purchase, without requiring, for the present, an assignment of the messuage or tenement, lands, and other premises comprised in the said term of five hundred years, to a trustee for himself, for the residue of the said term; and to accept from the said [*vendor*] his bond or obligation, with a suitable condition, within six calendar months, to procure such assignment, and to do, and cause to be done, such acts and things in relation thereto, as hereinafter expressed. AND WHEREAS, in pursuance of the said recited contract, and subsequent agreement, by indentures of lease and release, the lease bearing date the day next before the day of the date of the release, and the release bearing even date with the before written bond, and made, &c. [*state the purchase deed shortly.*]

Condition to discover trustee's personal representative, or to procure limited administration to him:

NOW THEREFORE, (in pursuance of the before recited agreement of the said [*vendor*], to secure the assignment of the said premises, for the residue of the said term of five hundred years,) THE CONDITION of the before written obligation is such, that if the said [*vendor*], his heirs, executors, or administrators, do and shall, at any time within six calendar months, to be computed from the day of the date of the before written bond or obligation, at his or their own costs and charges, either discover and ascer-

tain the personal representative of the said [*trustee*], or else cause and procure letters of administration to be granted by the proper ecclesiastical court in such behalf, to some proper person or persons, of the personal estate and effects of the said [*trustee*], which now remain unadministered, so far as respects the messuage or tenement, lands, and other premises, comprised in the said term of five hundred years, and by the said [*mortgagee*], assigned to the said [*trustee*], for all the then residue of the same term, in trust as aforesaid: AND ALSO do and shall thereupon, at the like costs and charges of him the said [*vendor*], his heirs, executors, or administrators, cause and procure any such personal representative of the said [*trustee*], to be discovered, or so to be constituted, as to the said term as aforesaid, well and effectually to assign and set over, all and singular the messuage or tenement, lands and other premises, comprised in the said term of five hundred years, with their appurtenances, unto such person or persons as the said [*purchaser*], his heirs or assigns, shall nominate or appoint, for all the then residue and remainder of the same term, *In trust* for him the said [*purchaser*], his heirs or assigns: *And* to assign, or otherwise dispose of the same premises, as he or they shall, from time to time, order and direct: *And* in the mean time, *In trust*, to permit the rest and residue of the said term, to wait upon and attend the reversion and inheritance of the same messuage or tenement, lands and other premises, so as to be subservient thereto, and to protect the same from all mesne and intervening incumbrances, if any such there be; *Then* the above written obligation shall be void; but otherwise shall be in full force.

TO PROCURE ASSIGNMENT OF TERM.

and to cause such personal representative to be discovered, or so to be constituted to assign the premises to such person as purchaser shall nominate, for residue of term, *In trust* for him, and to attend, &c.

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &c. AND FOR QUIET ENJOYMENT IN MEAN TIME.

BOND (*a*) *from Four Obligors to a Purchaser, that an Infant, and those claiming through him, or his Mother deceased, shall, within Six Months after he attains Twenty-One; or in case of his Death previously, his Heirs, &c. or those claiming through him or his Mother, shall* CONVEY FREEHOLD, AND SURRENDER COPYHOLD LANDS; *to an undivided Part of which the Infant is entitled, in common with the Obligors; and of which a Conveyance and Covenant to Surrender to the Purchaser has been executed by the Obligors, the Infant, and Others, by by Indentures of even Date: and the Obligors and Infant have been paid their Shares of the Purchase Money:* AND *that, in the mean Time, the Purchaser, his Heirs, &c. shall quietly enjoy the Premises, without any Interruption from the Infant, his Heirs, &c. or those claiming through him or them, or through his Mother deceased.*

Obligation one to one.

BOND from [J. C.] of, &c. [W. C.] of, &c. [J. R.] of, &c. and [H. B.] of, &c. to [*purchaser*] of, &c. in [*double the sum paid to the infant*] pounds, jointly, and any three or two jointly, and each of them severally, *ut ante*, 181.

Recital of lease and release to the purchaser,

WHEREAS by indentures of lease and release, the lease bearing date the day before the release, and the release

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(*a*) BONDS, CONSIDERED ON THE GROUND OF UNLAWFULNESS.

Bonds with conditions against the law, are void.

Bonds with conditions expressly against the law are void. Noy's Maxims, 78. For transactions which have for their object the encouragement of manifest crimes, such as murder, theft, perjury, and personal outrage, can never receive the sanction of a court of judicature; and any engagement for a reward to abstain from such crimes,

bearing even date with the above written bond, and made between [Sir G. W.], knight, of the first part; the said [J. C.], and [W. C], of the second part; [G. W.], of the third part; the said [J. B.], and [H. B.], and [*infant*], of the fourth part; [B. E. S.], of the fifth part; [G. M.], and

to uses to prevent dower;

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is equally discountenanced, as it might effectually lead either to criminality or extortion. Shep. Touchs. 132. So every transaction, the object of which is the violation of a public or private duty, is also void: such are bribes for appointing to offices of trust; private engagements that an office shall be held in trust for a person by whose interest it was procured;—agreements to stifle a prosecution for any crime of a public nature. See *Parsons* v. *Thompson*, 1 Hen. Bla. 322; *Garforth* v. *Fearon*, ibid, 327; *Blachford* v. *Preston*, 8 Durnf. and East, 89; *Collins* v. *Blantern*, 2 Wils. 347; 1 Fonbl. Treat. of Eq. 255, 5th ed.; 2 Evans's Pothier on Contracts, 2.

So every transaction, the object of which is the violation of a public or private duty, is also void.

All the instances of conditions against law, in a proper sense, are reducible under one of these heads.

1st. Either to do something which is *malum in se*, or *malum prohibitum*. Co. Lit. 206.

Instances of conditions against law.

2dly. To omit the doing of something which is a duty. Palm. 172. Hob. 12, *Norton* v. *Simms*.

3dly. To encourage such crimes and omissions. Fitz. tit. *Obligation*, 13. Bro. tit. *Obligation*, 34. Dyer, 118.

Such conditions as these the law will always, and without any regard to circumstances, defeat; being concerned to remove all temptations and inducements to those crimes; and therefore, as in Noy, and in Co. Lit. 206, a feoffment shall be absolute for an unlawful condition subsequent, and a bond void. But where there may be a way discovered to perform the condition, without a breach of the law, it shall be good, Hob. 12. Cro. Car. 22. Perk. s. 228. *Mitchell* v. *Reynolds*, 1 P. Wms. 189; in which case the subject is treated in a masterly manner. See also Com. Dig. *Chancery*, (4 D. 5).

Where the condition of a bond is entire, and the whole be against law, it is void; but where the condition consists of several different parts, and some of them are lawful, and the others not, it is good for so much as is lawful, and void for the rest. *Rex* v. *Yale*, 2 Brown P. C. 381. 5 Vin. Abr. 99, pl. 9. *Chesman* v. *Nainby*, 2 Ld. Raym. 1459. 2 Stra. 744, S. C. *Norton* v. *Simms*, Hob. 14. Mo. 856, 857, pl. 1175. *Twyne's* case, 3 Co. 83. a. *Mosdell* v. *Middleton*, 1 Vent. 237. 1 Saund. 66, a. *Newman* v. *Newman*, 4 Maule & Selw. 71. But if a sheriff take a bond for a point against 23 Hen. VI, concerning

A bond may be good in part, and bad in part.

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &c. AND FOR QUIET ENJOYMENT IN MEAN TIME.

[S.], his wife, of the sixth part; the above named [*purchaser*], of the seventh part; and [*trustee to prevent dower*], of the eighth part; *In consideration* of the sum of pounds, paid by the said [*purchaser*], to the said [J. B.], [H. B.], and [*infant*]: and of the sum of

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bail bonds, and also for a just debt, the whole bond is void; for the letter of the statute is so. *Norton* v. *Simms*, Hob. 14. 3 Vin. Abr. 451.

Bonds considered on the ground of unlawfulness:

Those bonds which chiefly deserve consideration, on the ground of unlawfulness, are such as relate to:—

Restraining trade.

I. Bonds restraining Trade. As to which, *vide ante*, Vol. I. 172, (*d*); *ante*, 289, (*a*).

Resignation.

II. Bonds of Resignation. As to which, *vide post.* [360].

Marriage brocage bonds are good at law, but not in equity.

III. Marriage Brocage-bonds.

Though these bonds are good at law, yet in equity they are justly condemned, as introductive of infinite mischief. *Law* v. *Law*, 3 P. Wms. 394. However equity does not interpose on account of any particular injury done to the party, who is *particeps criminis*, and not entitled to relief, but on public considerations, that marriage, as it greatly concerns the public good, may be on a proper foundation; *Law* v. *Law*, Cas. Temp. Talb. 132; 2 Eq. Ca. Abr. 187, pl. 2; *Debenham* v. *Ox*, 1 Ves. 277; and therefore, such a bond is in no case to be countenanced. Thus where the plaintiff gave a bond to the defendant, conditioned in effect, that if the plaintiff married J. S., then the plaintiff to pay a certain sum of money; the defendant procured the marriage, and put the bond in suit; but it was decreed to be delivered up, the young gentlewoman having 2000*l.* portion, and the man being sixty years of age, and having seven children. *Drury* v. *Hooke*, 1 Vern. 412. 2 Ch. Ca. 176. See Ch. Rep. 87. Tothill, p. 27, edit. 1820. So a bond for payment of 500*l.*, for procuring a marriage between persons of equal rank, fortune, &c. was, on appeal from the Court of Chancery, declared by the House of Lords to be void; because such bonds to match-makers are of dangerous consequence, and tend to the betraying and ruining persons of fortune and quality, and are not to be countenanced in equity; for marriage ought to be procured by the mediation of friends and relations; and such bonds would be of evil example to executors, guardians, trustees, servants, and others, who have the care of children. *Hall* v. *Potter*, Show. P. C. 76. *Smith* v. *Aykwell*, 3 Atk. 566. So a bond to *give*

pounds, paid by the said [*purchaser*] to the said [J. C.], and [J. B.]; and of the sum of pounds, paid by the said [*purchaser*] to the said [J. C.] and [W. C.]; the said [Sir G. W.], and [G. W.], (by the direction of the said [J. C.], [W. C.], [J. B.], [H. B.], and [*infant*]; and

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &C. AND FOR QUIET ENJOYMENT IN MEAN TIME.

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money, if such a marriage could be obtained, is ill; and, by the same reason, a bond to *forgive* a sum of money, in the same event, must be ill also. *Hamilton* v. *Mohun*, 1 P. Wms. 120. So wherever a mother or father, or guardian, insist upon a private gain, or security, for obtaining or consenting to a marriage, and obtains it of the intended husband, it will be set aside in equity. Thus J. S., by will, gave his niece 1200*l.*; she married, but, antecedently to the marriage, her father took a bond from the then intended husband to pay him 200*l.* in case the daughter should die without issue male in the life time of her husband: the daughter died without issue male, living her husband; the father sued the husband at law upon the bond, and the husband on a bill was relieved against this bond; for, it appearing that no money was paid, nor any consideration for entering into it, the court took it to be in the nature of a marriage brocage bond, and therefore ordered it to be delivered up. *Anon.* 2 Eq. Ca. Abr. 187, pl. 1: *Lamblee* v. *Hanman*, 2 Vern. 466, 499; *Hamilton* v. *Mohun*, 1 P. Wms. 118; Salk. 158; 2 Vern. 652; Gilb. Chan. 297; 1 Eq. Ca. Abr. 90, pl. 6; 10 Mod. 447; *Keat* v. *Allen*, 2 Vern. 588; *Anon.* Prec. Chan. 267; *Tooke* v. *Atkins*, 1 Vern. 451; *Gale* v. *Lindo*, 1 Vern. 475; *Kemp* v. *Coleman*, 1 Salk. 156; *Cole* v. *Gibson*, 1 Ves. 503; Belt's Supp. 211; *Hylton* v. *Hylton*, 2 Ves. 547. The power of a parent or guardian ought not to be used for such purposes, as it would be making a way to enable them to sell infants under their care. And these contracts with the father, mother, or guardian, though of the same nature with brocage bonds, are of more mischievous consequence, because it would happen more frequently. And it is now a settled rule, that if the father, on the marriage of his son, take a bond of the son, to pay him a sum of money, or make him any recompence, it is void, being procured by coercion while he is under the control of his father. Treat. of Eq. B. I. ch. iv. s. 10. Fonbl. 5th ed. 260. And as these contracts are avoided on reasons of public inconvenience, they will not admit of subsequent confirmation by the party; *Shirley* v. *Martin*, 1 Fonbl. 264, n. (1), 3 P. Wms. 74; *Cole* v. *Gibbon*, 1 Ves. 506; *Morse* v. *Royal*, 12 Ves. 364, 373; *Crow* v. *Ballard*, 1 Ves. jun. 220; *et vide ante*, 226, 256; and consequently

If a parent or guardian insist on a private gain, or security for obtaining or consenting to a marriage, and obtains it of the intended husband, it will be set aside in equity.

So if the father, on his son's marriage, take the son's bond, to pay him money, or make him any recompence, it is void.

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &C. AND FOR QUIET ENJOYMENT IN MEAN TIME.

with the consent of the said [B. E. S.], and [G. M.], and [S.] his wife), *have* bargained, sold, and released; *And* the said [J. C.], [W. C.], [J. R.], [H. R.], [*infant*], and [B. E. S.] *have* granted, released, and confirmed; *and* the said [G. M.], and [S.] his wife, *have* remised, released, and

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the party entitled to relief in a court of equity cannot release his right to a remedy, and thereby indirectly effect a confirmation, as it would be contrary to the maxims—that which is originally bad cannot be made good; and that which cannot be done directly cannot be done indirectly. *Sed vide* 1 Ves. 507. And the court will decree a gratuity actually paid, to be refunded: Thus where a servant maid prevailed with her master's niece, who was about fifteen years old, and lived in the same house with him, and was entitled to a good fortune, to marry his journeyman, without the consent or knowledge of her uncle; and for the good offices she was to do the journeyman in that affair, he had given her a bond of 100*l.* conditioned to pay her fifty guineas at six months end; and after he had gained the niece's good will, by the help of this maid, and the young lady had been prevailed on to go with him in a hackney coach to be married, he gave the maid fifty guineas more: the marriage was had; and afterwards the maid servant married, and the bond not being paid, was put in suit, and judgment obtained on it; and a bill was brought against the defendants, the maid servant and her husband, to be relieved against this bond, and to have the fifty guineas repaid; because the bond was entered into, and the money given for no good consideration, but only on account of this marriage brocage. And the Master of the Rolls decreed the bond to be given up, and satisfaction to be acknowledged on the judgment, and the fifty guineas received to be repaid; and if it were not done on service of the order, the defendants were to pay costs; and this, notwithstanding the husband of the servant maid insisted by his answer, that he looked upon the bond and fifty guineas as his wife's fortune, and had married her in prospect of it: and this decree was affirmed by Lord Keeper Wright. *Goldsmith* v. *Bruning*, 1 Eq. Ca. Abr. 89, pl. 4; *Smith* v. *Bruning*, 2 Vern. 392, S. C.

The court will decree a gratuity actually paid to be refunded.

IV. In restraint of Marriage and its rights.

In restraint of marriage and its rights.

It was a rule in the civil law, that marriage ought to be free. 3 Ves. 96. The same policy has obtained in equity: and therefore, in case of a bond in common form for payment of money, but proved that the agreement was, that the obligor should marry such a man, or should pay the money due on the bond; the court will decree this bond to

A bond to marry a particular person, or not to marry at all, is void.

for ever quitted claim unto the said [*purchaser*], and to his heirs, *All that, &c. To hold* the same (*subject*, as in the said indenture of release is mentioned,) unto the said [*purchaser*], and his heirs: *To the use* of such person or persons, &c. (*Uses to prevent dower, ut ante,*

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &C. AND FOR QUIET ENJOYMENT IN MEAN TIME.

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be delivered up to be cancelled, as being contrary to the nature and design of marriage, which ought to proceed from free choice, and not from any compulsion. *Key* v. *Bradshaw*, 2 Vern. 102. 1 Eq. Ca. Abr. 88. So, if A., being a widow, gives a bond to B. for 20*l.* if she should marry again, and B. gives a bond to the widow, to pay her executors the like sum if she did not marry again, and the widow soon after marries, her bond will be decreed to be delivered up. *Baker* v. *White*, 2 Vern. 215; *Woodhouse* v. *Shepley*, 2 Atk. 535. See *Lowe* v. *Peers*, 4 Burr. 2225; *Bateman* v. *Wells*, Tothill, p. 25, ed. 1820. So, where a bequest of an allowance to a feme covert was made on condition that she lived apart from her husband, the condition was held *contrâ bonos mores*, and void. *Brown* v. *Peck*, 1 Eden, 140. However there is a very late case, the principle of which seems opposed to the last cited case. It is thus stated: "A legacy was given to a father, on condition that he did not interfere with the education of his daughter. On a bill by the father for the legacy, the court required from him security to that effect, to be approved by the Master, and directed the costs of the proceedings to be paid out of the legacy." *Colston* v. *Morris*, 6 Madd. 89. It is presumed that the reporter has omitted some material circumstance, which was the ground of this decision; such as that the father was a profligate character, and therefore unfit to interfere in the education of his child: for otherwise the case is contrary to the general policy of the law, which encourages and preserves filial duty.

A bequest, on condition that a woman lived apart from her husband, is void.

V. To a kept Mistress*.

To a kept mistress.

Both courts of Law and Equity make a distinction, when it *appears* that these bonds are given as a reward for *past cohabitation*, and when it appears that they are given as an inducement to *future concubinage*; and therefore,

1st. *Præmium pudicitæ*, where the man is unmarried.

Præmium pudicitiæ, where the man is unmarried.

A bond, purporting to be *in consideration of cohabitation had* between the obligor and obligee, was held to be good; *per* Clive,

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* For the *Precedents* of Bonds and Settlements in favour of Kept Mistresses, see title Settlement.

and covenant to surrender copyholds.

Vol. I. 652.) And by the said indenture of release, and for the considerations thereinbefore expressed, the said [J. C.], [W. C.], [J. R.], [H. R.], and [*infant*], for themselves severally, and for their respective heirs, executors, and administrators; *and* the said [G. M.], for himself, his

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A bond, purporting to be in consideration of past cohabitation, is good.

Bathurst, and Gould, Justices (absent Chief Justice Wilmot), without hearing the other side. Clive, Justice. I am in a court of common law, and not in an ecclesiastical court. If a man has lived with a girl, and afterwards gives her a bond, it is good. Suppose this bond had been given by the defendant to the plaintiff for being his mistress, it would have been good in point of law, although in a court of equity it would be postponed to creditors. Sir Joseph Jekyll, Master of the Rolls, in a case where creditors interfered against a bond of this sort, wished he could have given the lady the money upon the bond: and where it is *præmium pudoris*, a court of equity will not relieve against such a bond. This condition is incapable of an explanation, to make the bond an illegal act. Bathurst, Justice—Where a man is bound in honour and conscience, God forbid that a court of law should say the contrary: and wherever it appears that the man is the seducer, the bond is good. Bracton says, when a man cohabits with an unmarried woman, it is *legitima concubina*. And *Exodus*, cap. xxii. v. 16. "*If a man entice a maid who is not betrothed, and lie with her, he shall surely endow her to be his wife.*" See also *Deuteronomy*, cap. xxii. v. 28, 29. "If a man find a damsel, who is a virgin not betrothed, and lay hold of her, and lie with her, *and they be found;* then the man who lay with her, shall give unto the damsel's father fifty shekels of silver, and she shall be his wife; because he hath humbled her, he may not put her away all his days." Honour and conscience ought to bind every man in point of law. In an action in the King's Bench, upon a promise of marriage, the evidence upon the trial was, that the defendant had bragged and boasted that he had debauched the plaintiff, by promising her marriage. This cause being tried before me on the circuit, I left it to the jury upon that evidence only, and they gave a verdict for the plaintiff, and 500*l.* damages, which I thought right. The Court of King's Bench approving of my opinion, refused to set aside the verdict, and thought 500*l.* damages were little enough. Gould, Justice—The court may take this for a lawful and conscientious consideration. We must presume that the defendant has done, what in honour and conscience he ought to have done; and that he thought himself a wrong doer, and gave the plaintiff this bond to make her amends. *Turner* v. *Vaughan*, 2 Wils. 339.

heirs, executors, and administrators, and for the said [S.] his wife, *have* covenanted with the said [*purchaser*], his heirs and assigns, that they the said [J. C.], [W. C.], [J. R.], [H. R,], [*infant*], [G. M.], and [S.] his wife, [Sir G. W.] and [G. W], respectively, and their respective heirs

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &c. AND FOR QUIET ENJOYMENT IN MEAN TIME.

A bond, even to a woman who has been a common prostitute, in consideration of past cohabitation, is good, because it enables her to lead a virtuous life.

Formerly it has been held in a court of equity, that if it were charged in a bill, and proved in evidence, that the defendant was a common strumpet, and commonly dealt and practised after that manner, and was accustomed to draw in young gentlemen, the court would relieve against a bond given to such a woman. *Whaley* v. *Norton*, 1 Vern. 484. Though, it seems, even in case the woman had been a prostitute, the court would not formerly relieve the party himself, who was culpable; though it was otherwise when his executor sought relief. *Matthew* v. *Hanbury*, 2 Vern. 187. *Bainham* v. *Manning*, 2 Vern. 242. *Bodly* v. ——, 2 Ch. Ca. 15. 19 Vin. Abr. 301. (E). However, the liberality of modern judges has softened this severity, on the ground that a provision enables a woman, in such an unfortunate situation, to lead a course of life more conducive to her happiness and to public morality. A voluntary bond given by a person to a common woman, after he had kept her two years, was not relieved against, upon a bill by the executor of the obligor. *Hill* v. *Spencer*, Ambl. 641. Lord Camden, in delivering his judgment, said, "I am clear in my opinion, that the plaintiff is not entitled to relief. The cases which have been determined against securities given to common prostitutes, went upon the circumstances of the *securities* being given *previous* to the *cohabitation; a consideration, which being* turpis *in its nature, the court has relieved against them.* In this case, the bond was not given for a consideration, but was voluntary. He had resort to her for near two years before he gave her the bond. Past service could not be a consideration at law [*quære, de hoc*]; and nothing was stipulated for the future. There is no principle in equity which says, a man may not give a voluntary bond to a common prostitute: it would be going but a little further to say, he could not give her money without her being liable to be called upon for it. There is no circumstance of fraud in this case; and I do not think, that in the case of a voluntary bond, the obligee being a common prostitute, is, of itself, a sufficient ground for relief." And, according to that case, the woman having been criminally connected with another man after she was taken into keeping, does not invalidate the bond. So, a voluntary bond, during cohabitation, to a woman previously of a very loose life, and soon afterwards another

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &c. AND FOR QUIET ENJOYMENT IN MEAN TIME.

and assigns, and [B. S.] and [R. W.], their heirs or assigns, would, as soon as conveniently might be, by common recovery or common recoveries, surrender or surrenders, or other customary assurance, surrender and assure, according to the custom of the manor of [B.], in the said county of

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bond, expressly securing a continuance of the connexion, by an annuity in case of separation; on a bill by the executor to have the bonds delivered up, was, by the Court of Exchequer, dismissed with costs: the former being considered unimpeached, and the latter void at law, as *pro turpi causâ*. *Gray* v. *Mathias*, 5 Ves. 286. So a bill brought to be relieved against a bond given *to a housekeeper for secret service*, was dismissed. *Bainham* v. *Manning*, 2 Vern. 242.

2d. *Præmium pudicitiæ pellicis.*

If the consideration of the bond be for past cohabitation with a married man, equity will not *assist* the obligee, if she knew the obligor was a married man.

If the consideration be for past cohabitation with a married man, equity will not *assist* the obligee, if she knew the obligor was a married man. Thus, a bill for payment of a sum of money, and an annuity secured by a deed-poll by defendant to plaintiff, who, being a young woman, came to live in the family of defendant, then a married man, as a companion to his sister, and who, by continuing to live with him, occasioned a separation from his wife, was dismissed, but without costs, on account of her previous good character. *Priest* v. *Parrot*, 2 Ves. 160. [As to this judgment, see 2 Sim. & Stu. 264.]

A married man, after having lived in adultery with a woman, and had children by her, executes a deed, providing for her and the children, in case of his death, and deposits it in the hands of his attorney, but afterwards procures possession of it himself.--Held, on demurrer, that the woman and her children can maintain a bill to compel him to deliver up this deed: That the

However, where there are children, the modern doctrine of the court is more liberal. Thus in *Knye* v. *Moore*, 1 Simons and Stuart, 61, the bill stated that the plaintiff, Sophia Knye, became, in the year 1808, servant to the defendant, and for four years conducted herself with strict propriety; that in the year 1811, some differences having arisen between the defendant and his wife, the defendant began to pay very particular attention to the plaintiff, S. Knye, and proposed to her to cohabit with him; that she at length yielded to his solicitations, and agreed to his proposals; that in 1812, defendant fitted up a cottage in the neighbourhood for her, where she resided and cohabited with him until some time in the year 1816, and in the course of such cohabitation was delivered of four children, of whom the defendant was the father, namely, the plaintiffs Henry and Charles, and two other children since dead; that in the year 1816, the defendant having several legitimate children, became desirous of putting an end to the connexion, and of making a due provision for the plaintiff, Sophia Knye, and the other plaintiffs, her children; and for that purpose, wrote and sent a letter to her, dated 21st August, 1816, whereby he informed her, that his

[Y.], *All that*, &c. with their appurtenances; *To the use* of the said [*purchaser*], his heirs and assigns, according to the custom of the said manor of [B.] AND WHEREAS the said [*infant*], is an infant of the age of years, or thereabouts, and the part or share of the said [*infant*]

Recital of infancy, and payment of infant's share of pur-

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absence from England, which would take place immediately, made their separation necessary, and requested her to quit the cottage; and assured her, that so long as the children were maintained at her expense, and her conduct justified her claim upon him, she should be provided for by an allowance of 100*l.* a year, to be paid by his bankers; and that if any accident happened to him, she and the children were provided for by a deed executed by him, and left in trust with his attorney, Mr. H.: that being extremely desirous of putting an end to the connexion, she agreed to quit the cottage, and accept the provision; and that in pursuance of the agreement, she gave up possession of the cottage, and accepted the provision of 100*l.* a year; and that she had, ever since August, 1816, wholly supported her children, and conducted herself with propriety: that the defendant, for a short time after entering into the agreement, remitted to her from time to time various sums of money, on account of the promised provision; but that since July, 1820, he had ceased to pay her any sum on account thereof, and had also procured the deed, mentioned to have been executed by him for the benefit of her and her children, to be delivered into his custody or possession; and that he refused to deliver up the same, or to discover the contents thereof.

person with whom the deed had been deposited need not be made a party, as no breach of trust was charged against him; and that the bill was not multifarious, though it also sought performance of an agreement to pay an annuity to the woman, which could not be decreed in equity.

The bill charged, that it was fully agreed between the defendant and the plaintiff Sophia Knye, for the purpose of putting an end to the connexion between them, that the defendant should, during his life, pay her the annual sum of 100*l.*, as a provision for the support and maintenance of herself and children; and that the letter above mentioned contained the terms of this agreement; and that the agreement was by the letter duly reduced into writing, and was, in equity, a good and valid agreement on the part of the defendant, to pay to the plaintiff, during his life, the annual sum of 100*l.*; and that the payments made by him were acts of part performance of the agreement.

The bill prayed a specific performance of this agreement, and that the defendant might be decreed to pay to the plaintiff, S. Knye, the arrears and future payments of the annuity, during his life, she being willing to support and maintain the children; and that the defendant might be decreed to deliver up the deed, and that it might be deposited in safe custody.

To this bill the defendant demurred for want of equity. And in

chase money, notwithstanding.

of and in the said purchase or consideration money, in the said indenture of release expressed to be paid to him, was paid to him, notwithstanding his infancy, with the consent of the said [J. C.], [W. C.], [J. R.]. [H. R.], and [*infant*]. AND WHEREAS upon the treaty for the purchase

Recital of agreement,

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support of the demurrer it was urged—*First*, this is not one of those cases where a man, having debauched a woman, makes a provision for her; but this is the case of a married man, and comes within the doctrine laid down in *Priest* v. *Parrot*, 2 Ves. 160. That case has been cited in the House of Lords, and the doctrine of Lord Hardwicke acknowledged; it was also cited to the Master of the Rolls, in *Matthews* v. *L.*, 1 Madd. 558, and not objected to. There is no case in which this court has held a deed like the present, made by a married man, to be valid. See *Spicer* v. *Hayward*, Precedents in Chancery, 114; and the *Marchioness of Annandale* v. *Harris*, 2 P. W. 432; and 3 Bro. P. C. 445. *Secondly*. The demurrer is also sustainable *ore tenus*, for multifariousness. The first part of the bill states an agreement with the mother only, by which she was to receive 100*l*. a year, in consideration of former cohabitation. As to this, she alone is entitled to sue; she cannot join to that claim another in which she and other persons are jointly interested; for, as to the other matters, she claims jointly with her children. *Thirdly*. Another ground of demurrer is, that if they come here for this deed, the person, in whose hands the bill states the deed to have been deposited, ought to have been a party to this suit.

In support of the bill, it was said that this case was distinguished from *Priest* v. *Parrott*, by the circumstance of there being children, who are innocent parties.

Equity will not decree a specific performance of a voluntary promise by letter in favor of a woman seduced.

The Vice-Chancellor, Sir John Leach, said, the agreement, contained in the letter stated in the bill, must be considered as merely voluntary; therefore a bill will not lie for the performance of it. [As to this, see *post*, 337.] But it is a very different question, whether the defendant must not answer as to the deed of settlement which he is alleged to have executed and delivered to a trustee for the plaintiffs, and afterwards to have improperly obtained again from the trustee.

Courts of equity will lend their aid to enforce securities

It seems to be established by the case of the *Marchioness of Annandale* v. *Harris*, 2 P. W. 432, 3 Bro. P. C. 445; (which afterwards went to the House of Lords), and by *Ord* v. *Blackett*, and *Carew* v. *Safford*, (there cited,) that courts of equity will lend their aid to enforce securities given as the *præmium pudicitiæ*. Lord Hardwicke states, 2 Ves. 161, that in *Annandale* v. *Harris*, it appeared that Lord Annandale was not married at the time of his connexion with the defendant. No

of the said freehold and copyhold hereditaments by the said [*purchaser*], it was agreed, that the said [J. C.], [W. C.], [J. R.], and [H. R.], should by their bond, in the penalty of [*double the sum paid to the infant*], pounds, guaranty unto the said [*purchaser*], his heirs, appointees,

that obligors should give bond to guaranty infant's confirmation, and covenant to surrender premises, or of his part therein:

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such circumstance is stated in the report, nor does it appear to have formed any ingredient in the decision. The principle of that case is, that if a man misleads an innocent woman, it is but justice and reason that he should make her reparation; and, therefore, notwithstanding the immorality of the connexion which led to the provision, a court of equity will lend its aid to enforce it. If a woman be the victim of a married man, it is not less justice and reason that he should make her reparation than if he were unmarried; and the deeper shade of immorality in the connection is not a very tangible or satisfactory ground of distinction. In the case of *Priest* v. *Parrot*, there were no children. Now here, in the first place, the deed is a provision for the mother and her children, and they are co-plaintiffs; and if I was to decide that the mother could not maintain this bill, there is no principle that the children could not. The case of the children here makes it quite clear, that this general demurrer cannot be maintained. It is then said, that there is a defect of parties; because the person to whom the deed was delivered, is not before the court. If the trustee had delivered up the deed in breach of his trust, then he ought to have been before the court, in order to be charged in respect of such breach, but not otherwise. Another objection is taken to the bill, as being multifarious, because it seeks for the performance of an agreement under which the mother alone is entitled; and joins to this another claim, in which she is interested jointly with her children. But the whole case of the mother being properly the subject of one bill, the suit does not become multifarious because all the plaintiffs are not interested to an equal extent. Demurrer overruled.

given as *præmium pudicitiæ*, if the woman did not know that the man was married.

If a woman be the victim of a man, it is not less justice and reason that he should make her reparation than if he were unmarried.

[On the overruling of the demurrer, the bill was amended, and the cause came on, on bill and answer, when the Vice Chancellor directed a case to be sent to a court of Common Law, to enquire whether the circumstance of the defendant's being a married man at the time of the cohabitation with the plaintiff, forms a good defence at law to an action upon such a bond. 2 Sim. & Stu. 260; and accordingly a court of law determined, that the marriage of the seducer was no defence. *Nye* v. *Moseley*, 6 B. & C. 133. So that the doctrine laid down in *Priest* v. *Parrot*, *ante*, 332, may now be considered as exploded, both at law and in equity. *Ed.*]

So, it seems, that equity will not, in any case, relieve the obligor on

Equity will not in any case re-

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &C. AND FOR QUIET ENJOYMENT IN MEAN TIME.

and assigns, a confirmation of the conveyance and assurance, and covenant for the surrender and assurance by the said recited indenture of release, expressed to be made by the said [*infant*], of the said freehold and copyhold hereditaments, or of the part, share, estate, and interest of the

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lieve the obligor, on his own application.

his own application: as where he had seduced his wife's sister, and had several children by her, and had given her a bond for payment of money, as a provision for her and the children; the bond being put in suit against him, he brought a bill, suggesting that the bond was not given for money lent, or any valuable consideration; Lord Somers decreed the payment of what was due on the bond, for principal and interest, with costs, by a short day, or else the bill to be dismissed with costs: and his Lordship said it was a pity he could do no more. *Spicer* v. *Hayward*, Prec. Chan. 114. 1 Fonbl. Treat. of Equity, 229.

These bonds being voluntary, equity will postpone the payment of them out of the personal estate, until all the other creditors, whether by bond or simple contract, are paid; but if the personal estate falls short, then they must be paid out of the real estate, if any.

These bonds being merely voluntary, even though *præmium pudicitiæ*, the payment of them out of the personal estate will be postponed by a court of equity, until all the other creditors, whether by bond or simple contract, are paid; but if the personal estate falls short, then they must be paid out of the real estate, if there be any. *Jones* v. *Powell*, 1 Eq. Ca. Abr. 84, pl. 2. *Cray* v. *Rooke*, Ca. Temp. Talbot, 153. *Harris* v. *Marchioness of Annandale**, 2 P. Wms. 432. 3 Bro. Par. Ca. 445. 1 Eq. Ca. Abr. 87, pl. 6, S. C. Thus, where A. having a wife who lived separate from him, afterwards courted and *married* another woman, who knew nothing of the former wife's being alive; but it being discovered to the second wife, that the former was alive, A., in order to prevail with the second wife to stay with him, some years afterwards gave a bond to a trustee for the second wife, to leave her 1000*l.* at his death, and died, not leaving assets to pay his simple contract debts; Sir Joseph Jekyll held, that if this bond had been given immediately on the discovery, and they had parted thereupon, it had been good; but being given in trust for the second wife, after such time as she knew the first wife was living, and to induce her to continue with A. this was worse than a voluntary bond, and decreed to be postponed to all the simple contract debts. Lady *Cox's* case, 3 P. Wms. 339. 2 Eq. Ca. Abr. 182, pl. 6, 258, pl. 13. So, where there was a bond by S. G., upon articles, in consideration of 10*l.*, which imported a direct assignment by Mr. H. of his wife, who was herself a party, *to the use* of S. G.; with covenants for quiet enjoyment, and further assurance; upon a bill to have this bond postponed, and to be relieved

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* [As to the judgment in this case, see 2 Sim. & Stu. 264.]

said [*infant*] therein: *And* should, in the mean time, secure unto the said [*purchaser*], his heirs, appointees, and assigns, the quiet possession and enjoyment of the same freehold and copyhold hereditaments, as against the said [*infant*], and his heirs, and those claiming under him

and in mean time secure to purchaser quiet possession, as against infant, his heirs, and those claiming

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against an assignment and bill of sale of goods made by S. G. in trust, and for the benefit of Mrs. H.; as to creditors, the bond and bill of sale were set aside, because they appeared to be for undue consideration. *Robinson* v. *Gee*, 1 Ves. 254. But a bond of this kind must be paid before legacies; for, although voluntary, yet it transfers a right in the life of the obligor, and legacies arise only from the will, which takes effect only from the testator's death, and therefore ought to be postponed to a right created in the testator's lifetime. *Fairebeard* v. *Bowers*, 2 Vern. 202; Prec. Chan. 17, S. C. *Jones* v. *Powell*, 1 Eq. Ca. Abr. 143, pl. 15, 16; Gilb. Chan. 297-8; *Cray* v. *Rooke*, Cas. Temp. Talbot, 155; 2 Eq. Ca. Abr. 182, pl. 7.

A voluntary bond must be paid before legacies.

But the bond or deed must be executed; for in matters *executory*, even on the consideration *præmium pudicitiæ*, the Court of Chancery will not compel the party, or his executors, to fulfil an agreement to provide for a forsaken kept mistress. *Whaley* v. *Norton*, 1 Vern. 483. Thus, a general demurrer was allowed to a bill against the widow and executrix of the testator, to enforce an agreement by him when single, first by a letter to the plaintiff, and afterwards by a parol agreement with her, to settle an annuity on the plaintiff, who was separated from her husband, and a deed of separation was executed by them, in which the husband gave up all claim to any property the plaintiff might acquire. After this separation, the plaintiff was induced to live with the testator, and lived with him for several years; when he, being about to marry, communicated his intention to a lady, a friend of the plaintiff, requesting her to break the matter to the plaintiff, and expressing an intention to settle upon her 100*l.* a-year. The testator wrote afterwards to the plaintiff, enclosing her 25*l.*, which he said, "I look upon as a quarter of the annuity I intend securing to you for your life, which shall be regularly paid at the four usual quarters. I shall send you 50*l.* in the course of a few days, and will send you the same sum at Christmas, to purchase what you may have occasion for to make you comfortable." In consequence of the proposal of the annuity, it was finally agreed between the plaintiff and the testator, that the connection should cease, and that the plaintiff should not in any respect impede or endeavour to prevent the intended marriage with the defendant; and that the plaintiff should in future live a retired, chaste, and virtuous life, and should so conduct herself as in no respect to interfere with the connection by way of marriage, which the testator was about to

Equity will not compel the party, or his executors, to fulfil an agreement to provide for a kept mistress.

under him or them, or his mother d-ceased.

or them, or [*mother*], his mother deceased, in manner hereinafter mentioned: And in pursuance of such agreement, and for the purpose of effectuating such guaranty and security, the said [J. C.], [W. C.], [J. R.], and [H. R.], have entered into the above written bond or obligation.

And to effect such guaranty, obligors have given above bond.

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form: every one of which stipulations the plaintiff performed; and the testator promised or agreed to settle upon the plaintiff 100*l. per annum* for life. Sir Thomas Plumer, Vice-Chancellor, said, This bill states only an agreement to secure an annuity, and that agreement was not founded on any good, meritorious, or valuable consideration; it was therefore voluntary, and I take it to be a clear rule in this court, that a bill does not lie to enforce a voluntary agreement. It has been contended, that there was a moral obligation to provide for this woman. Did that moral obligation arise in respect of the past adulterous intercourse? Certainly not. Though separated from her husband, she was not absolved from her marital obligation to live chastely; and her connection with the testator was a high offence by the divine law, as well as against society. Whether, if any annuity had been settled, the court would take it from her; or whether the court would refuse her any assistance, as in *Priest* v. *Parrot*, it is not necessary to consider. *Matthews* v. *L———e*, 1 Madd. Rep. 558. 563. [Past cohabitation, and the ceasing to cohabit in future, are not alone sufficient considerations for a promise to pay an annuity. *Binnington* v. *Wallis*, 4 B. & A. 560; in which case the same distinction was taken as to contracts executed, and contracts executory.]

If there be any fraud practised on a woman seduced, in relation to a security, *præmium pudicitiæ*, equity will afford relief.

But if there be any *fraud* practised on the unfortunate woman, a court of equity would afford her relief. Thus, where a man having debauched a young woman, and intending afterwards to deceive her, made a settlement upon her of 30*l.* a-year for life, out of an estate which was not his; the court decreed him to make it good out of an estate which he had of his own; and this decree was afterwards affirmed on appeal to the House of Lords. *Carew* v. *Safford*, 1 Eq. Ca. Abr. 31, pl. 4. And where Sir W. B., having seduced Mrs. O. then a young lady of about fourteen years of age, of a good family, and entitled to 12,000*l.* fortune, settled on her 300*l. per annum* for years; but the estate was encumbered, and, Mrs. O. dying, her administrator brought a bill in order to disincumber the land which was charged with this annuity, and was relieved accordingly. *Ord* v. *Blacket*, cited in *Marchioness of Annandale* v. *Harris*, 1 Eq. Ca. Abr. 87, pl. 6; 2 P. Wms. 433; 19 Vin. Abr. 303, pl. 2.

As "equity relieves against accidents," it seems that if

Under the maxim, that "equity relieves against accidents," Grounds and Rudiments of Law and Equity, 87, it seems, if the grantee in a voluntary deed, or the obligee in a voluntary bond, lose the deed or

Now THE CONDITION of the above written obligation is such, that if the said [*infant*], his heirs (*b*), executors, and administrators, and every other person claiming, or to claim by, from, through, or under him, them, or any of them, or by, from, through, or under the said [*mother*],

Condition if infant, and those claiming through him, or his mother deceased, should, within six months after

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bond by accident, they may have remedy against the grantor or obligor in equity. *Underwood* v. *Staney*, 1 Ch. Ca. 78; 13. Vin. Abr. 104, pl. 4; 20 Vin. Abr. 101, pl. 2; Lat. 24; 2 Ch. Ca. 30. Though 1 Eq. Ca. Abr. 92, pl. 4, adds, "*Quære*, for these matters are discretionary:" and there are certainly some old cases contrâ. *Miller* v. *Reumes*, 1 Roll. Abr. 375, *Chancerie* (Q.) pl. 1; *Vincent* v. *Beverlye*, Noy, 82; Pop. 205, 206. See *Toulmin* v. *Price*, 5 Ves. 235. Though, in a more modern case, where J. S., a little before his death, granted an annuity of 30*l.* *per annum* to his housekeeper, and entered into a voluntary bond for payment of the annuity, and the bond being lost, his representatives were decreed to pay the annuity, or the penalty of the bond, though it appeared that there were no wages due to her, service alone being a consideration; and no *turpis contractus* shall be presumed, unless proved. *Lightebone* v. *Weedesh*, 1 Eq. Ca. Abr. 24, pl. 7; *Ibid.* 93, pl. 5.

the obligee of a voluntary bond lose it by accident, he may have remedy against the obligor in equity.

3d. *Præmium concubinati.*

Though a court of law will not enquire into the consideration of a bond, yet, if it appear to be illegal on the face of it, the court cannot sanction the claim: thus a bond, reciting that the parties had agreed to *live together*, therefore the obligor had agreed to find the woman meat, drink, washing, lodging, &c. and to leave her an annuity of 60*l.* a-year if *he* quitted her, or she outlived him: and if they had any child, he was to take care of and provide for it. But if *she* should leave him, or go to another man, then he should *not* be obliged to provide for her any longer, or leave her any annuity. Lord Mansfield said, it is the price of prostitution, *præmium prostitutionis:* for, if she *becomes virtuous*, she is to *lose* the annuity. It appears clearly, upon the condition, that the bond is illegal and void. *Walker* v. *Perkins*, 3 Burr. 1568.

3d. *Præmium concubinati.*

Bond for cohabitation with a woman seduced by obligor, and for maintenance after his death, void in law.

But after verdict at law upon a bond *præmium concubinati*, against the obligor, a demurrer was allowed to a bill to have it delivered up, charging the consideration to have been an agreement by the defendant to cohabit with the plaintiff as his wife; and that she had lived in a

After a verdict at law on a bond, *præmium concubinati*, a demurrer was allowed to a

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(*b*) This is inserted because the infant may die after attaining twenty-one, and before the end of six months.

he attains twenty-one ; or in case of his previous death, if his heirs, &c. or those claiming

his mother deceased, shall and do, within six calendar months next after the said [*infant*] shall attain the age of twenty-one years ; *Or* in case of his decease under that age, if the heirs, executors, and administrators of, or other person or persons claiming, or to claim by, from, through,

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bill to have it delivered up.

state of adultery and incontinence with various persons, and praying a discovery. *Franco* v. *Bolton*, 3 Ves. 368.

Bonds for gaming debts.

VI. Bonds for Gaming Debts.

By the 9th Ann. c. 14. all *bonds* and *other securities*, given for money won at play, or money lent at the time to play with, are utterly void. See further, 4 Bla. Com. 172. 1 Fonbl. Treat. of Equity, 233. Horse-racing is gaming within the 9th Ann. *Blaxton* v. *Pye*, 2 Wils. 309. *Clayton* v. *Jennings*, 2 Wm. Bla. 706; *Ximenes* v. *Jacques*, 6 Durnf. and East, 499; *Whaley* v. *Pagot*, 2 Bos. and Pull. 51. But a man has been allowed to recover money which he had lent to the defendant to game with, and at the same time won it of him; for the word *contract* was not mentioned in the statute 9 Ann. c. 14. *Barjean* v. *Walmsley*, 2 Str. 1249. So, where plaintiff lent defendant money to bet at a horse-race, he was allowed to recover. *Aleinbrook* v. *Hall*, 2 Wils. 309. See also *Wettenhall* v. *Wood*, 1 Esp. N. P. Ca. 18. *Robinson* v. *Bland*, 1 Bla. 234. 256. 2 Burr. 1077. *Faikney* v. *Reynous*, 4 Burr. 2069. *Aubert* v. *Maze*, 2 Bos. and Pul. 371.

Of relief on an illegal transaction, where the claimant is particeps criminis. At law, *particeps criminis* cannot recover money he paid freely.

VII. Of relief at law, and in equity, on an illegal transaction, where the claimant is *particeps criminis*.

1st. *At law* :—Where a man pays money on a mistake in an account, or where one pays money under or by a mere deceit, or if one recovers money *malâ fide*, by suit in an inferior court, he may bring *indebitatis assumpsit* for the money. *Moses* v. *Macfarlan*, 2 Burr. 1005. 1 Bl. Rep. 219. S. C. But where one *knowingly* pays money upon an illegal consideration, or where the act is in itself immoral, or a violation of the general laws of public policy, he is *particeps criminis*, and he shall not have this action, for he parted with his money freely, and *volenti non fit injuria*. *Tomkins* v. *Bernet*, 1 Salk. 22. Skin. 411, S. C. For where both parties are equally offenders against such laws, *potior est conditio defendentis* ; *Smith* v. *Bromley*, Doug. 698; not because the defendant is more favoured, but because the plaintiff must draw his justice from pure fountains. Therefore, though if A. agree to give B. money for doing an illegal act, as if a wager be made on a boxing match, B. cannot, (though he do the act) recover the money by an action ; yet if the money be paid, A. cannot recover it back again. *Webb* v. *Bishop*, Bull. N. P. 132, 7th ed. See *Lacaussade* v. *White*, 7 Durnf.

or under him, or the said [*mother*], deceased, shall and do, immediately after such heirs, executors, or administrators, or other person or persons, shall be competent at law so to do, by good and sufficient conveyances, surrenders, and assurances in the law, to the good liking and satisfaction of the said [*purchaser*], his heirs, appointees, or assigns, or his or their counsel in the law, (but at the costs and charges of the said [*infant*], his heirs, executors, or administrators,) well and effectually convey, surrender, release, and assure, unto the said [*purchaser*], his heirs, appointees, and assigns or otherwise, as he or they shall direct or appoint; *All* the part and share in fee simple, estate, right, title, and interest of the said [*infant*], in and to the said freehold and copyhold lands, tenements,

through him, or his mother, should, on being competent so to do, (at the costs of infant, his heirs, &c.) convey and surrender to purchaser, his heirs, &c. infant's share of the freehold and copyhold premises, free from all incumbrances by infant, his heirs, &c. or his mother:

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and East, 535; *Howson* v. *Hancock*, 8 Durnf. and East, 575; *Vandyck* v. *Hewitt*, 1 East, 96.

[But this rule is confined to parties seeking redress who must be presumed to know that they were doing an unlawful act. *Adamson* v. *Jarvis*, 4 Bing. 66. *Ed.*]

2d. *In equity*:—Equity extends relief to *particeps criminis*, on grounds of public policy; *Hatch* v. *Hatch*, 9 Ves. 292, 299; *Shirley* v. *Martin*, cited 1 Ball and Bea. 358—9; 3 P. Wms. 75; 1 Fonbl. Treat. Equity, 264, (*s*); 11 Ves. 536, 537; 9 Ves. 299; therefore, it is no objection that the plaintiff himself was a party in the illegal transaction; because the public interest requiring that relief should be given, it is given to the public through the plaintiff, though he be himself *particeps criminis*. *Lord St. John* v. *Lady St. John*, 11 Ves. 535, 536. Thus A., by his interest with the Commissioners of the Excise, got an office in that branch of the revenue for B., who, in consideration thereof, gave a bond to A. to pay him 10*l. per annum*, as long as B. enjoyed the place; equity relieved against the bond. *Law* v. *Law*, 3 P. Wms. 391; Cas.Temp.Talb. 140; 2 Eq. Ca. Abr. 187, pl. 10. So money advanced by the plaintiff to the defendant to procure him a commission in the marines, was decreed to be refunded with interest, the plaintiff having, after six months, been discovered to have worn a livery, and being thereupon discharged: first, upon grounds of public policy; and secondly, as the plaintiff had been imposed upon, the defendant knowing that he was incapable of holding the commission. *Morris* v. *M'Cullock*, Ambl. 432; 2 Eden, 190, S. C. A private agreement obtained by a father from his son, in derogation of an allowed sale, of the command of a post-office packet, by the father to the son, duly registered

Equity extends relief to *particeps criminis* on grounds of public policy.

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &C. AND FOR QUIET ENJOYMENT IN RMEAN TIME.

and if in mean time the purchaser, his heirs, &c. should quietly enjoy the premises, without any interruption from infant, his heirs, &c. or those claiming though him

and hereditaments, mentioned and comprised in the said recited indenture of release, bearing even date with the above written bond, and expressed to be thereby granted and released, and covenanted to be surrendered, freed, and discharged of and from all incumbrances previously made, done, or suffered by the said [*infant*], his heirs, executors, or administrators, or the said [*mother*], deceased: AND ALSO, if, in the mean time, and until such conveyance, surrender, release, and assurance shall be made and executed by the said [*infant*], his heirs, executors, or administrators, or those claiming through, or under him or them, or the said [*mother*], deceased, as aforesaid; the said [*purchaser*], his heirs, appointees, and assigns, shall and do, from time to time, and at all times, peaceably and

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in the name of the son, upon a promise by the officers of the post-office, that if he would convey the vessel to the son, they would appoint the son commander of the packet in the room of his father, on a bill filed by the widow and executrix of the son against the executors of the father, an account was decreed. Sir William Grant said, That the agreement which is impeached by this bill was illegal, as being a fraud upon the post-office, cannot be doubted after the cases of *Hartwell* v. *Hartwell*, 4 Ves. 811; *Thompson* v. *Thompson*, 7 Ves. 470; and more particularly *Parsons* v. *Thompson*, 1 Hen. Bla. 322; *Garforth* v. *Fearon*, *Ibid.* 327. I think it illegal also, upon the ground of its being a fraud on the provisions of the ship registry acts, stat. 26 Geo. III. c. 60; stat. 34 Geo. III. c. 68. The father, therefore, could never have enforced it; but my doubt was, whether, the father having received the profits, this court would decree them to be accounted for, and refunded; or whether the general rule, that *in pari delicto melior est conditio possidentis*, should prevail, as both are guilty of a violation of the law. Upon an examination of the cases, however, I think the plaintiffs are entitled to the relief sought by the bill. Courts, both of law and equity, have held, that two parties may concur in an illegal act, without being deemed to be in all respects *in pari delicto*. I consider this agreement as substantially the mere act of the father. He put up to sale a situation, which the young man would naturally be desirous of obtaining, and could obtain only upon the terms prescribed by his father. In the case of *Morris* v. *M'Cullock*, Amb. 432, the parties were more independent of each other; yet the money paid was decreed to be returned. In *Goldsmith* v. *Bruning*, 1 Eq. Ca. Abr. 89, pl. 4, a

quietly have, hold, occupy, possess, and enjoy the said freehold and copyhold hereditaments mentioned and comprized in the said recited indenture of release, and expressed to be thereby granted and released, and covenanted to be surrendered and assured, with their appurtenances, without any let, suit, trouble, denial, eviction, interruption, or disturbance of, from, or by the said [*infant*], his heirs, executors, administrators, or assigns, or any person or persons claiming, or to claim by, from, through, or under him, or them, or any of them, or by, from, through, or under the said [*mother*], deceased; *Then* the above written obligation shall be void; but otherwise shall remain in full force.

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &C. AND FOR QUIET ENJOYMENT IN MEAN TIME.

or them, or through his mother;

then obligation to be void.

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marriage-brocage case, the party obtaining money by the sale of her influence, must have been considered as more criminal than the purchaser; for she was decreed, first at the Rolls, and afterwards upon appeal, to refund the sum which she had received. There is no case calling in question that decision. Lord Thurlow indeed, in *Neville* v. *Wilkinson*, 1 Bro. C. C. 543 (see 547—8, and Eden's notes), seems to have thought, that in all cases where money was paid for an illegal purpose, it might be recovered back; observing, that "if courts of justice mean to prevent the perpetration of crimes, it must be not by allowing a man, who has got possession, to remain in possession, but by putting the parties back to the state in which they were before." It is, however, unnecessary, in the present case, to lay down so broad a rule. These parties are not, I think, *in pari delicto*, by entering into this illegal agreement. It was not confirmed, if indeed it admitted confirmation, by signing the account. The account must, therefore, be taken as if the son had been, from the beginning, the actual owner of the packet, and entitled to all its earnings. As the plaintiff chooses to open the account, the defendants are not bound by any deductions which they agreed to make, if they can establish a right to the sums deducted. *Osborne* v. *Williams*, 18 Ves. 379.

The profits of a partnership in underwriting, made illegal by the stat. 6 Geo. I. c. 18. s. 12*, cannot be recovered at law, *Sullivan* v. *Greaves*, Park's Insurance, 8; *Michell* v. *Cockburn*, 2 Hen. Bla. 379; nor be the subject of account in equity. *Knowles* v. *Haughton*, 11 Ves. 168; contra, *Watts* v. *Brooks*, 3 Ves. 612, but now overruled.

The profits of partnership in underwriting, made illegal by 6 Geo. I. cannot be recovered at law, or be the subject of account in equity.

* [This act is partially repealed by the 6 Geo. IV. c. 91.]

THAT FOUR INFANTS SHALL CONVEY ON SEVERALLY COMING OF AGE.

BOND *on a Conveyance by Devisees in Trust for Sale, to a Purchaser, that the Devisor's Four Infant Sons, who are beneficially interested in the Purchase Money, shall severally, on attaining Twenty-one, convey to the Purchaser.*

Obligation two to one, jointly and severally.

BOND from [*obligor*] of, &c., and [*obligor*] of, &c., widow, to [*purchaser*] of, &c., (*in double the amount of the infants' shares of the purchase money*) pounds, jointly and severally, *ut ante*, 179.

Recital of lease and release by the obligors and two other devisees, in trust for sale:

WHEREAS by indentures of lease and release, the lease bearing date the day next before the day of the date of the above written obligation, and the release bearing even date herewith, and made or mentioned to be made, between the above bounden [*two obligors*], and [*two other trustees*], (devisees and executors, named in the last will and testament of [*testator*], late of, &c., deceased) of the one part, and the above named [*purchaser*] of, &c., of the other part; *After reciting* that the said [*testator*], in and by his last will, &c. *It was* by the said indenture of release, *witnessed*, that (*state the conveyance shortly*). AND the said [*two obligors*] have by the said indenture of release, covenanted with the said [*purchaser*], that they the said [*obligors*], or either of them, and all and every other persons or person having, or claiming any legal or equitable estate, or interest of or in the said premises, or any part thereof, by, from, or under them, the said [*obligors*], or either of them, or the said [*testator*], deceased, in any wise, shall and will, from time to time, and at any time or times hereafter, upon the reasonable request, and at the

and that by release, the obligors have covenanted for further assurance by themselves, and those claiming under them, or under the testator.

proper costs and charges in the law of the said [*purchaser*], his heirs and assigns, make, do, acknowledge, levy, suffer, and execute, or cause or procure to be made, done, acknowledged, levied, suffered, and executed, all such further and other lawful and reasonable acts, deeds, and things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, releasing, conveying, assuring, and confirming unto, and to the use of the said [*purchaser*], his heirs and assigns, the said premises and every part thereof.

THAT FOUR INFANTS SHALL CONVEY ON SEVERALLY COMING OF AGE.

NOW THE CONDITION of the above written obligation is such, that if the said [*four infants*], the sons of the said [*testator*], deceased, severally, do and shall, after their severally attaining their respective ages of twenty-one years, upon the request, and at the proper costs and charges in the law, of the said [*purchaser*], his heirs or assigns, by good and sufficient conveyances and assurances in the law, grant, and release and convey unto, and to the use of the said [*purchaser*], his heirs or assigns, the said hereditaments and premises comprised in the said indenture of release, and all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of them the said [*four infants*], the sons, and of each of them, of, in, to, and out of the same, and every part thereof: *Then* the above written bond or obligation shall be void; but otherwise shall be and remain in full force and virtue.

Condition that four of the *cestuis que trust*, sons of the devisor, shall severally, on attaining 21, convey to purchaser.

TO PROCURE TRUSTEE'S HEIR TO CONVEY LEGAL ESTATE, OR TO REPAY PURCHASE MONEY.

BOND *from a Vendor to a Purchaser, that he will at his own Expense, within Months, procure the Heir, or Co-heirs of a Trustee, to convey the Legal Estate to the Purchaser: Or, if the Vendor should not be able to procure such Conveyance, then that he will repay the Purchase Money, at the end of such Months, on having the Premises reconveyed; freed from all Incumbrances by the Purchaser, and from all manner of Waste, Spoil, and Damage: and that the Purchaser shall be permitted to receive the Rents, in lieu of Interest, till the Conveyance of the Legal Estate, or Repayment of the Purchase Money.*

Obligation, one to one.

BOND from [*vendor*] of, &c. to [*purchaser*] of, &c. in the sum of [*double the purchase money*] pounds, *ut ante*, 179.

Recital of conveyance to purchaser: agreement that vendor would, at his own expense, within months, procure the heir, or co-heirs of trustee to convey legal estate of premises sold to purchaser in fee:

WHEREAS, &c. (*recite the conveyance to the purchaser*). AND WHEREAS the said [*vendor*] did, at the time of the execution of the said in part recited indentures of lease and release, agree, that he the said [*vendor*], his heirs, executors, or administrators, would, at his or their own expense, within the space of months, to be computed from the day of the date of the said recited indenture of release, procure the said [*two co-heirs of trustee*], or the heir or co-heirs at law for the time being of the said [*trustee*], by good and sufficient deed or deeds, fine or fines, common recovery or common recoveries, or such conveyances and assurances in the law, to be approved by the said [*purchaser*], his heirs or assigns, or his or their counsel, to convey and assure the legal estate and inheritance of and

in the said lands and hereditaments mentioned and comprised in the said in part recited indentures of lease and release, unto and to the use of the said [*purchaser*], his heirs and assigns for ever, to and for his and their own use and benefit; or unto such person or persons as he or they should direct or appoint; *Or* in case he the said [*vendor*], his heirs, executors, or administrators, should not be able, within the time aforesaid, to procure the said [*two co-heirs of trustee*], or the person or persons who for the time being should be the heirs or co-heirs at law of the said [*trustee*], to join in making such conveyance of the legal estate and inheritance of and in the said hereditaments and premises as aforesaid, that he the said [*vendor*], his heirs, executors, or administrators, would, at the end of such months, repay, or cause to be repaid unto the said [*purchaser*], his executors, administrators, or assigns, the said sum of [*purchase money*] pounds, as and for the repurchase of the said hereditaments and premises, upon having the same reconveyed to him the said [*vendor*], his heirs or assigns, or to such person or persons as he or they should direct or appoint, in manner hereinafter mentioned. AND the said [*vendor*] did also agree, that the said [*purchaser*] should be let into the immediate receipt of the rents and profits of the said hereditaments and premises so conveyed to or in trust for him as aforesaid: *And* that such rents and profits should, in the event of the said consideration money, or sum of [*purchase money*] pounds being repaid as aforesaid, be retained by the said [*purchaser*], his executors, administrators, or assigns, in lieu or stead of any interest on the said sum of [*purchase money*] pounds.

TO PROCURE TRUSTEE'S HEIR TO CONVEY LEGAL ESTATE, OR TO REPAY PURCHASE MONEY.

or in case vendor should not be able so to procure such heir, or co-heirs of trustee to join in making such conveyance, that vendor would, at the end of such months, repay purchase money, upon having premises reconveyed:

that purchaser should be let into immediate receipt of rents:

and retain same in lieu of interest, if purchase money should be repaid.

NOW THE CONDITION of the above written bond or obligation is such, that if the above bounden [*vendor*] shall and do, at his or their own expense, (within the space of months, to be computed from the date of the said hereinbefore in part recited indenture of release) procure the said [*two co-heirs of trustee*], or the person or persons who for the time being shall be the heir or co-heirs at law of the said [*trustee*], by such good and sufficient deed or deeds, fine or fines, common recovery or common

Condition, if vendor should, at his own expense, within months, procure heir, or co-heirs of trustee to convey legal estate to purchaser:

TO PROCURE TRUSTEE'S HEIR TO CONVEY LEGAL ESTATE, OR TO REPAY PURCHASE MONEY.

recoveries, conveyances and assurances in the law, as the said [*purchaser*], his heirs or assigns, or his or their counsel shall advise, to convey and assure the legal estate and inheritance of and in the said lands and hereditaments hereinbefore particularly mentioned and described, and comprised in the said hereinbefore in part recited indentures of lease and release, unto and to the use of the said [*purchaser*], his heirs and assigns, to and for his and their own use and benefit, or unto such person or persons as he or they shall direct or appoint: Or in case the said [*vendor*], his heirs, executors, or administrators, shall not be able to procure the said [*two co-heirs of trustee*], or the person or persons who for the time being shall be the heir or co-heirs at law of the said [*trustee*], to convey and assure the same premises, within the space of months from the day of the date of the said indenture of release, unto and to the use of the said [*purchaser*], his heirs and assigns for ever, to and for his and their own use and benefit, or unto such person or persons as he or they shall direct or appoint; *Then* if the said [*vendor*], his heirs, executors, or administrators, or any of them, shall and do well and truly pay, or cause to be paid at the end of such months, unto the said [*purchaser*], his executors, administrators, or assigns, some or one of them, the sum of [*purchase money*] pounds of lawful money of Great Britain [and Ireland], without any deduction or abatement whatsoever, as and for the repurchase of the said lands and hereditaments in and by the said hereinbefore in part recited indentures of lease and release, conveyed and assured unto and to the use of, or in trust for the said [*purchaser*], his heirs and assigns for ever, upon having the same hereditaments and premises, and every part and parcel thereof, (at the request, costs, and charges of the said [*vendor*], his heirs or assigns,) reconveyed and assured unto and to the use of the said [*vendor*], his heirs or assigns, or unto such person or persons as he or they shall direct or appoint, by the said [*purchaser*] and [*his trustee to prevent dower*], their heirs or assigns, or the person or persons claiming, or who shall or may claim any estate, right, title, trust, or interest of, in, to, or out of the said hereditaments and premises, or any part or parcel thereof, by, from, under, or in trust for them,

or if vendor should not be able to procure such conveyance, then if he should repay purchase money at the end of such months, on having premises reconveyed;

either or any of them; *Freed* and discharged of and from all and all manner of incumbrances whatsoever in the mean time, to be made, done, or committed by them, either, or any of them: *And also* from all and all manner of waste, spoil, and damage to be done to the said lands, hereditaments, and premises, or any part or parcel thereof, by them, either, or any of them: AND ALSO if the said [*purchaser*], his heirs or assigns, shall be permitted to receive and take the rents, issues, and profits of the said lands, hereditaments, and premises so conveyed to, or in trust for him and them as aforesaid, from the day of up to the time the legal estate and inheritance of and in the said lands and hereditaments shall be conveyed and assured unto and to the use of the said [*purchaser*], his heirs and assigns for ever; or as he or they shall direct or appoint as aforesaid; or up to the time the said sum of [*purchase money*] pounds shall be repaid by the said [*vendor*], his heirs, executors, or administrators, unto the said [*purchaser*], his executors, administrators, or assigns as aforesaid, without any molestation, interruption, or disturbance whatsoever; *Then* the above written bond or obligation shall be void, or else shall remain, continue, and be in full force and virtue.

TO PROCURE TRUSTEE'S HEIR TO CONVEY LEGAL ESTATE, OR TO REPAY PURCHASE MONEY.

freed from all incumbrances by purchaser; and from all manner of waste, spoil, and damage: and if purchaser should be permitted to receive the rents till conveyance of legal estate, or repayment of purchase money:

bond to be void.

FOR QUIET ENJOYMENT; OR RETURN OF PURCHASE MONEY, IF EVICTED.

BOND *from a Vendor to a Purchaser, for Quiet Enjoyment of the Freehold and Leasehold Property, or a Return of the Purchase Money in case of Eviction.*

Obligation, one to one.

BOND from [*vendor*] of, &c., to [*purchaser*] of, &c. in the sum of [*double the amount of the purchase money*] pounds, *ut ante*, 179.

Recitals.

WHEREAS, &c. (*recite will of testator; death, and proof of will; lease and release, and assignment to purchaser; and agreement for bond*, ut post, 356.) NOW THE CONDITION of the before written obligation is

Condition, if purchaser, his heirs, executors, &c. should for ever hereafter, in respect of freehold, and during continuance of terms in respect of leasehold, peaceably enjoy.

such, that if the said [*purchaser*], his heirs, executors, administrators, and assigns, do and shall, according to the different natures and tenures of the said messuage or tenement, and premises, so purchased by him, the said [*purchaser*], as aforesaid, from time to time, and at all times for ever hereafter, in respect of the freehold parts thereof, and during the continuance of the aforesaid terms in respect of the said leasehold parts thereof, peaceably and quietly have, hold, occupy, possess, and enjoy all and singular the said freehold and leasehold hereditaments and premises so purchased by him, as aforesaid, and every part and parcel thereof, with their and every of their rights

and receive the rents, without any interruption from certain persons:

privileges, members, and appurtenances; and receive and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own proper use and benefit, without any let, suit, trouble, molestation, eviction, ejection, interruption, denial, or disturbance whatsoever, of, from, or by the said [E. F.] and [G. H.], or either of them, or either of their assigns; or of any other person or persons claiming, or to claim by, from, through, or under

them, or either of them; or of, from, or by any person or persons claiming or to claim any estate, right, title, or interest at law, or in equity, in, to, or out of the same premises, or any part thereof, under, or by virtue of the limitations in the said recited will of the said [*testator*], deceased, to the first and other sons of the body of the said [I. K.], in tail male, and to all and every the daughter and daughters of the body of the said [I. K.], in tail general, as aforesaid; or under, or by virtue of any or either of the limitations, or any other of the limitations, uses, trusts, matters, and things contained in the will of the said [*testator*]; or by, from, through, or under the said [*testator*], or his estate: OR, if the said [*purchaser*], his heirs, executors, administrators, or assigns, shall be evicted from, or be dispossessed of the said premises, or any part thereof, either for the whole, or any part of the estate or interest so purchased by him as aforesaid, by reason, or means, or in consequence of any ejectment or ejectments, action, or actions, suit or suits at law or in equity, or other proceeding or proceedings, claim or demand, claims or demands whatsoever, at any time or times hereafter to be brought, commenced, prosecuted, made, or set up by the said [E. F.] and [G. H.], or either of them, their, or either of their assigns; or by any person or persons claiming, or to claim by, from, through, under, or in trust for them, or either of them; or by any person or persons claiming or to claim any estate, right, title, or interest, at law or in equity, in, to, or out of the same premises, or any part thereof under or by virtue of the limitations to the issue of the said [I. K.], hereinbefore mentioned, either, or any of them; or any other of the limitations, uses, trusts, matters or things, contained in the said will of the said [*testator*]; or by, from, through, or under the said [*testator*], or his estate, or in any wise in relation thereunto; *Then* if the said [*vendor*], his heirs, executors, administrators, or assigns, shall and do, upon demand, and upon a conveyance being made by the said [*purchaser*], his heirs, executors, administrators, and assigns, unto the said [*vendor*], his heirs, executors, administrators, and assigns, or as he or they shall direct, of so much, and such part and parts, if any, of the said freehold and leasehold premises, as shall then re-

FOR QUIET ENJOYMENT; OR RETURN OF PURCHASE MONEY, IF EVICTED.

or if purchaser, or his heirs, &c. should be evicted from the whole, or any part of the estate, by any of such persons;

then if vendor, his heirs, &c. should, on demand, and on a reconveyance being made by purchaser, his heirs, &c. of residue (if any), of premises, free from all incumbrances by

FOR QUIET ENJOYMENT; OR RETURN OF PURCHASE MONEY, IF EVICTED.

main vested in the said [*purchaser*], his heirs, executors, administrators, or assigns, after such eviction as aforesaid; or of or from which, he or they shall not be evicted or dispossessed as aforesaid, free from all charges and incumbrances, made, done, committed, or suffered by him or them (the expenses of such conveyance to be paid by the said [*vendor*], his heirs, executors, or administrators), well and truly pay, or cause to be paid, unto the said [*purchaser*], his executors, administrators, or assigns, the said sum of [fifteen thousand] pounds, so paid by him for the purchase aforesaid; and all costs, charges, and expenses, which shall be incurred by him or them, in defending any such action or suit, actions or suits, as aforesaid; *Then* the above written obligation shall be void, but otherwise shall remain in full force.

him or them, well and truly pay purchaser, his executors, &c. purchase money, and all costs in defending possession;

bond to be void.

FOR QUIET ENJOYMENT, WHERE TITLE WAS TOO RECENT.

BOND *for Quiet Enjoyment, where the Title commenced at too late a Period.*

Obligation, one to one.

BOND from [*vendor*] of, &c. to [*purchaser*] of, &c. in the sum of [*double the purchase money*] pounds, *ut ante*, 179.

Recital of conveyance to purchaser: of commencement of title:

WHEREAS (*recite a conveyance of a piece of land to the purchaser*, to uses *to prevent dower*.) AND WHEREAS the title to the said purchased premises [originally] produced by the said [*vendor*], to the said [*purchaser*], commenced with an indenture bearing date the day of 17 , being or purporting to be a conveyance in fee simple of the said premises, to [T. B.] gentleman. AND WHEREAS an objection was made, on the part of the said [*purchaser*], to the title of the said [*vendor*], to the said purchased premises, because it commenced at too recent a period; *And* the said [*vendor*], not being able to

that an objection was made because it commenced too recently: that vendor, not being able

FOR QUIET ENJOYMENT; WHERE TITLE WAS TOO RECENT.

produce satisfactory evidence of the earlier title, he the said [*vendor*] offered and proposed, in order to induce the said [*purchaser*] to complete the said purchase, to execute, and give to him, the said [*purchaser*], his bond or obligation, in the above-mentioned penalty, with such condition for making the same void, as hereinafter is contained.

to produce earlier title, offered to give this bond.

NOW THE CONDITION of the above written bond or obligation is such, that if the said piece or parcel of land, hereditaments, and premises, comprised in and conveyed or intended to be conveyed, by the hereinbefore recited indenture of release, of even date with these presents, with the appurtenances, shall from time to time, and at all times hereafter, go, and remain, *To the uses*, in and by the same indenture of release limited, expressed, or declared, of and concerning the same; and be peaceably and quietly entered into and upon, and held, occupied, possessed, and enjoyed; and the rents, issues, and profits thereof, and of every part thereof, had, received, and taken accordingly; without the lawful let, suit, trouble, denial, eviction, interruption, claim or demand whatsoever, of or by any person or persons whomsoever (*other than, and except* any person or persons claiming, or to claim, by, from, or under the said T. B.) (*a*); *Then*, the above written bond or obligation to be void, and of no effect: otherwise to be and remain in full force and virtue.

Condition, if premises conveyed should hereafter remain to the uses declared in the release;

and be peaceably enjoyed;

and the rents received;

without interruption by any person whomsoever; (except persons claiming under the purchaser in the first abstracted conveyance); then the bond to be void.

(*a*) This exception is made because the purchaser has the benefit of the covenants for title, in the purchase deeds subsequent to T. B.'s. Probably his purchase was from trustees, who were not obliged to enter into covenants for title.

FOR QUIET ENJOYMENT AGAINST ALL PERSONS, EXCEPT LESSEE FOR YEARS.

BOND *from a Vendor to a Purchaser, for peaceable Enjoyment of an Estate, against all Persons whomsoever;* EXCEPTING *Persons claiming under a Lease for Years.*

Obligation, one to one.

BOND from [*vendor*] of, &c., to [*purchaser*] of, &c., in the sum of [*double the purchase money*] pounds, *ut ante*, 179.

Recital of lease for years: lease and release to purchaser:

WHEREAS (recite a lease for years by vendor; then that by indentures of lease and release, the lease bearing date, &c., and made between, &c., in consideration of pounds paid by purchaser to vendor, *All*, &c. were conveyed and assured unto and to the use of the said [*purchaser*], his heirs and assigns for ever.)

agreement for bond.

AND WHEREAS, at the time of executing the said in part recited indentures of lease and release, it was agreed between the said [*vendor*] and [*purchaser*], that he the said [*vendor*], should enter into such an obligation as is above written, with such a condition as is hereinafter contained.

Condition, if purchaser, his heirs, &c. should peaceably enjoy premises;

NOW THEREFORE THE CONDITION of the above written obligation is such, that if the said [*vendor*], his heirs or assigns, shall and do, from time to time, and at all times hereafter, peaceably and quietly have, hold, occupy, possess, and enjoy the said messuages and hereditaments, comprised in, and granted and released by the said indenture of release, and every of them, and every part thereof,

and receive the rents;

with their appurtenances; *And* have, receive, and take the rents, issues, and profits thereof, and of every part thereof,

without interruption by any person whomsoever;

to and for his and their own use and benefit; without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of or by him the said

[*vendor*], or his heirs, or any other person or persons whomsoever, any estate, charge, right, title, or interest, legal or equitable, having or claiming, or at any time or times hereafter, to have or claim, in, to, from, out of, or upon the said hereditaments, or any of them, or any part thereof; (*Save and except*) the person or persons claiming, or to claim, on account or in respect of the said recited lease;) *Then*, and in that case, the said obligation to be void, otherwise to be and remain in full force and virtue.

(except persons claiming under lease for years;) then bond to be void.

BOND *from a Vendor to a Purchaser, for Quiet Enjoyment against all Mankind; free from all Incumbrances; and for Further Assurance, generally.*

FOR QUIET ENJOYMENT GENERALLY, FURTHER ASSURANCE, &c.

BOND from [*vendor*] of, &c. to [*purchaser*] of, &c., in the sum of [*double the purchase money*] pounds, *ut ante*, 179.

Obligation, one to one.

WHEREAS [*testator*], late of, &c., who was the only brother and heir at law of [ ] late of &c., who died intestate, as to his real estate, and without issue, duly made and published his last will and testament in writing, bearing date on or about the day of 18 . and thereby devised all his real estates to his wife [*wife*]; and appointed her sole executrix of his will. AND WHEREAS the said testator died on or about the day of 18 , without having altered or revoked his said will; *And* shortly after his decease, his said widow and executrix, duly proved the said will in the prerogative court of Canterbury. AND WHEREAS the said [*widow*], afterwards intermarried with and is now the wife of the said [*obligor*]. AND WHEREAS the said [*obligor*], and [ ] his wife, have lately sold unto the said [*purchaser*], *All that,*

Recital of will, whereby testator devised all his real estates to his wife:

death of testator, and proof of his will:

marriage of widow with obligor: sale to purchaser of part of the estate devised;

FOR QUIET ENJOYMENT GENERALLY, FURTHER ASSURANCE, &c.

&c., and the inheritance thereof in fee simple, being part of the hereditaments and real estate by the said will of the said [*testator*] deceased, devised by the said [*wife*], as aforesaid, at or for the price or sum of pounds: AND

lease and release, and fine to purchaser:

in consideration thereof, by indentures of lease and release, the lease bearing date the day before, and the release bearing even date with the above written bond or obligation, and made between the said [*obligor*], and [ ] his wife, of the one part, and the said [*purchaser*], of the other part; *and* by virtue of a fine, duly levied, or intended to be levied, in pursuance of a covenant for that purpose contained in the said indenture of release, the lands, &c. hereinbefore described, and the inheritance thereof in fee simple, are conveyed and assured, or are intended to be conveyed and assured (*a*), unto and to the use of the said [*purchaser*], his heirs and assigns for ever. AND WHEREAS upon the treaty for the purchase of the said hereditaments hereinbefore mentioned, it was agreed, that the said [*obligor*] should enter into a bond in the penalty of [*double the purchase money*], with a condition thereunder written, for securing unto the said [*purchaser*], his heirs and assigns, the quiet enjoyment of the same hereditaments; free from incumbrances; and for the further assurance thereof, in manner hereinafter mentioned.

agreement for bond for quiet enjoyment, free from incumbrances, and for further assurance.

Condition, if purchaser should quietly enjoy premises;

NOW THE CONDITION of the above bond or obligation is such, that in case the said [*purchaser*], his heirs and assigns, shall and do, from time to time, and at all times hereafter, peaceably and quietly have, hold, occupy, possess, and enjoy the said lands and hereditaments hereinbefore mentioned and comprised in the said indenture of release, bearing even date with the above written

and receive the rents;

bond or obligation; *and* receive and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their use and benefit; without any let, suit, trouble, denial, eviction, ejection, interruption, or disturbance whatsoever, of, from, or by the said [*obligor*], and [ ] his wife, or either of them, or of, from, or by any person

(*a*) If to uses to prevent dower, *vide ante*, 329.

or persons whomsoever: AND that (*b*) if the said lands and hereditaments now are, and henceforth for ever hereafter shall remain, continue, and be unto the said [*purchaser*], his heirs and assigns, free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said [*obligor*], his heirs, executors, or administrators, or some or one of them, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all, and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, right and title of dower, uses, trusts, wills, intails, statutes, recognizances, judgments, extents, executions, debts, legacies, annuities, sum and sums of money, rent and arrears of rent; and of, from, and against all and singular other estates, titles, troubles, charges, and incumbrances (*c*) made, done, committed, or suffered by the said [*obligor*], and [ ] his wife, or any other person or persons whomsoever; AND MOREOVER, that if the said [*obligor*], and [ ] his wife respectively, and all and every other person or persons having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title, trust, or interest in, to, or out of the said lands and hereditaments, hereinbefore mentioned, and comprised in the said indenture of release, bearing even date with the above written bond, or any part thereof, shall and do, from time to time, and at all times hereafter, upon every reasonable request in writing, and at the costs and charges of the said [*purchaser*], his heirs or assigns, make, do, acknowledge, levy, suffer, execute, and perfect, or cause or procure to be made, done, acknowledged, levied, suffered, executed, and perfected, all and every such further and other lawful and reasonable acts, deeds, and things, devices, conveyances, and assurances in the

FOR QUIET ENJOYMENT AGAINST ALL PERSONS, EXCEPT LESSEE FOR YEARS.

free from all incumbrances;

if further assurances should be made on purchaser's request:

(*b*) *Vide ante*, Vol. II. 21.

(*c*) [Where a vendor gave a bond to a purchaser, with a condition to indemnify him from all manner of incumbrances theretofore made by the vendor to T. T. or any other person; although a general obligation to indemnify extends only to acts of lawful title, yet it is different where a particular person is named, as the obligation is thereby made special. *Nash* v. *Palmer*, 5 M. & S. 374. *Ed.*]

law whatsoever, for the further, better, more perfectly, lawfully, and absolutely, or satisfactorily granting, releasing, confirming, or otherwise assuring the said lands and hereditaments, with their appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns, or otherwise, as he or they shall direct or appoint; *As* by the said [*purchaser*], his heirs or assigns, or his or their counsel in the law, shall be reasonably devised, or advised, and required; *Then* the above written bond or obligation shall be void; but otherwise shall be and remain in full force.

bond to be void.

TO REPAIR A ROAD.

BOND *from a Purchaser under the Commercial Road Act, to the Trustees, to keep in Repair a Road from the Land purchased to communicate with the new Road.*

Obligation, one to seven.

BOND from [*purchaser*] of, &c. to [*seven trustees*] of, &c., being trustees appointed to carry into execution an act of parliament made and passed in the year of the reign of his present Majesty King George the Fourth, intituled "*An act*," &c. in the sum of pounds, *ut ante*, 179.

Recital, that trustees are seised of a piece of ground:

WHEREAS the above named [*trustees*], as trustees as aforesaid, are seised of or entitled to a piece or plot of ground, lying and being between the old road, in the said act of parliament called , and the road made, or intended to be made, under the said act of parliament.

which not being wanted for purposes of act, trustees are authorised to sell same:

AND WHEREAS the same piece or parcel of ground, together with so much of the old road as adjoins thereon, not being wanted for the purposes of the said act, the said trustees are authorised by the said act to make sale thereof to any person who shall be an occupier or occupiers of any buildings fronting such ground, and who shall hold the same buildings for any term longer than seven years.

that act required purchaser to

AND WHERE-

TO REPAIR A ROAD.

keep a private road in repair:

AS (*recite that it is required by the act, that in case of such sale, the purchaser should be bound to keep in repair a good road from such old road to the new one.*) AND WHEREAS (*recite contract for sale to* [*purchaser*]*; and lease and release to him.*) AND WHEREAS the said sale was made on condition that the said [*purchaser*], his heirs, executors, administrators, or assigns, should make and keep in repair, during the said term of years, such road, of twenty feet wide, as aforesaid, and at the end of the said term deliver up the same, or cause or procure the same to be delivered up, to the owner or owners of the premises now in the occupation of the said [*purchaser*], to be holden by such owner or owners, jointly with the said [*purchaser*] and [A. B.], and the heirs and assigns of the said [A. B.].

contract for sale and conveyance to purchaser:

sale made, on condition that purchaser should repair road.

NOW THE CONDITION of the above written bond is such, that in case the said [*purchaser*], his heirs, executors, administrators, or assigns, shall and do, as soon as the same can be done, make and set out, and from time to time, during the said term of years, keep in repair a good and sufficient carriage road, of the width of twenty feet at least from the front of the same premises, now in the possession of the said [*purchaser*], to the road made by the said trustees under or by virtue of the said act. AND ALSO, in case the said [*purchaser*], his heirs, executors, administrators, or assigns, shall and do, at the expiration of the said term of years, deliver up the said carriage road, or cause and procure the same to be delivered to the owner or owners of the said premises so occupied by him the said [*purchaser*] as aforesaid, to be holden and enjoyed by the said owner and owners jointly with the said [*purchaser*] and [A. B.], and the heirs and assigns of the said [A. B.], for the purpose of communication with the road made, or intended to be made under or by virtue of the said act; *Then*, and in such case, the above written bond or obligation shall be void, and of none effect; but otherwise shall be and remain in full force and virtue.

Condition, if purchaser should, during his term, repair road;

and at the end of term deliver up same to be enjoyed by owner of land, jointly with purchaser and another;

bond to be void.

BONDS OF RESIGNATION.

[In the first edition of this work three forms of bonds for the special resignation of livings were here inserted, adapted to the circumstances most likely to arise on the existing state of the law; but, as all bonds of special resignation, which shall henceforth be given, as well as bonds of general resignation, are now declared to be void, *Fletcher* v. *Lord Sondes*, *post*, 432, these precedents have been struck out, as they are entirely useless. See *post*, 432. *Ed.*]

Simony was not an offence punishable in a criminal way at the common law. Moore, 564; Cro. Car. 361. The ecclesiastical law deprived the incumbent of the living; but it could not affect the temporal rights of any person for making a simoniacal contract, or subject him to any forfeiture or penalty. However, it was at length prohibited under very severe penalties, by the following act; 31 Eliz. cap. 6, intituled, "*An act against abuses in election of scholars, and presentation to benefices.*" The three first sections of this act, and the greater part of the fourth, relate to the election of fellows, scholars, &c., into colleges, &c. But at the end of the fourth section, are the following words; "And for the avoiding of simony, and corruption in presentations, collations, and donations of and to benefices, dignities, prebends, and other livings, and promotions ecclesiastical, and in admissions, institutions, and inductions to the same."

A. D. 1589.

The penalty for simoniacally presenting to a benefice, or for being presented for reward.

Sec. V. "Be it further enacted by the authority aforesaid, that if any person or persons, bodies politic and corporate, shall or do at any time after the end of forty days next after the end of this session of parliament, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurances, of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly, or indirectly, present, or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such *corrupt* cause or consideration, that then every such presentation, collation, gift, and bestowing, and every admission, institution, investiture, and induction thereupon, shall be utterly void, frustrate, and of none effect in law: And that it shall and may be lawful to and for the queen's majesty, her heirs and successors, to present, collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical, for that one time or turn only, and that all and every person or persons, bodies politic and corporate, that from thenceforth shall give or take any such sum of money, reward, gift, or benefit, directly or indirectly, or that shall take or make any such promise, grant, bond, covenant, or other assurance, shall forfeit and lose

the double value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical; and the person so corruptly taking, procuring, seeking, or accepting any such benefice, dignity, prebend, or living, shall thereupon and from thenceforth be adjudged a disabled person in law, to have or enjoy the same benefice, dignity, prebend, or living ecclesiastical."

Anciently it was held, that the statute did not make the bond void, but only the presentment.

Lord Coke says, "*Nota*, the statute doth not make the bond, promise, covenant, or other assurance void, but the presentment, &c. and so it was adjudged, Pasch. 40 Eliz. Rot. 1745, in *communi banco*, between *Gregory*, plaintiff, and *Oldbury*, defendant. [But see 362.] *Nota differentiam inter malum in se* against the common law, *et malum prohibitum*, by statute law; *et malum in se* against the common law, and *malum prohibitum* by the civil or canon law; whereof the judges of the common law, in these cases, take no notice." 3 Inst. 153; *post*, 387, 403-4. Therefore, if the incumbent did not resign on request, he was subject to the whole penalty of the bond. Degge's Parson's Counsellor, 55, 6th ed. *Sed vide post*, 368-9, 382-3, 397.

Differentiam inter malum in se, et malum prohibitum.

What is simony now, depends on 31 Eliz. c. 6.

What is or is not simony *now*, depends on the statute 31 Eliz. c. 6, which did not adopt all the wild notions of the canon law; but has *defined* it to be a corrupt agreement to present. *Per* Chief Justice De Grey, *Barrett* v. *Glubb*, 2 Wm. Bla. 1052; Cunningham's Law of Simony, 2, 97; 3 Inst. 153.

Definition of bonds of resignation as being either special, or general.

A BOND OF RESIGNATION is a bond given by the person presented, or intended to be presented to a benefice, with a condition to resign the same: and is *special*, or *general*. The condition of a special one, is to resign the benefice in favour of some certain person, as a son, kinsman, or friend of the patron, when he shall be capable of taking the same. By a general bond, the incumbent is bound to resign on request.

Preliminaries, on the general professional opinion concerning bonds of resignation, in consequence of the *Bishop of London* v. *Ffytche;* and the reason for examining the subject in detail.

Formerly, general as well as special bonds of resignation, whether given before or after the presentation, were held good at law, and Chancery only interfered when an improper use was attempted to be made of them. But in the case of the *Bishop of London* v. *Ffytche*, *post*, 375, the House of Lords held, that a PRESENTATION *after* a general *bond of resignation*, is illegal: the bond being a *benefit* to the patron, within the 31 Eliz. c. 6; and the giving it being the *price* of his presentation; and it being given for the *purpose* of obtaining the presentation. (*Vide post*, 460.) And, therefore, the House held, that the bishop cannot be compelled to induct the parson presented. The validity of the bond was not in issue: indeed it could not be in a *quare impedit*, although those who supported the determination maintained that the bond was good. *Vide post*, 380, 386, 387, 403, 405. However, subsequently to that case, the prevailing opinion of the profession

has been, that no *general* bond of resignation could be supported; and writers have even gone so far as to say, that the house adjudged that a general bond of resignation was void. See Leach's note, 12 Mod. 505 (*b*); 6 Bac. Abr. Gwill. ed. 192; 1 *Ibid.* 644, (K); 1 Fonbl. Trea. Equity, 232 (*b*); Christian's note, 2 Bl. Com. 280 (8); 6 Supp. Vin. Abr. 173, pl. 2; Ellis on Debtor and Creditor, 119; and the subsequent cases concerning bonds of resignation. Dr. Wooddeson, with his usual discrimination, classes it with the causes for which a bishop may legally reject a clergyman presented to him for institution. 1 Wooddes. Vin. Lect. 323. And in consequence of the principle of the case of the *Bishop of London* v. *Ffytche*, Lord Eldon seems to have some doubts on his mind, whether any *special* bond of resignation is valid*. [See *post* 432.]

Under these circumstances, it is necessaay that the substance of the leading cases should be stated, before any conclusion is drawn. In this work the same plan has been adopted in several instances, for thereby the reader is enabled fully to examine the subject for himself, and ascertain whether a just conclusion is formed.

Bond to pay money for resignation of a benefice, good.

Before the statute, in an action of debt upon bond, conditioned to pay one hundred pounds at Michaelmas; defendant pleads the money was to be paid for *resignation* of a benefice, with intent that another should be presented, and shewed that the patron, obligor, and obligee

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* [The distinction attempted to be drawn by the author of this note, between the presentation and the bond itself, cannot be supported. Since the case of *The Bishop of London* v. *Ffytche*, bonds of general resignation have been universally held void. It is true that the majority of the judges in that case did not think them so, but Lord Chancellor Thurlow advocated the contrary opinion, divided the House of Lords upon it, and obtained a majority. In the latest case on the subject, *Fletcher* v. *Lord Sondes*, *post*, 432, every judge who delivered his opinion declared, that at all events, bonds of general resignation were void. See 3 Bing. 505. 532. 545. 546. And the Lord Chief Baron Alexander, addressing himself to the above distinction, made use of the following forcible expressions: "If a contract be void, either as prohibited by positive enactment, or as contravening the policy of the law, the engagements on both sides must be equally invalid. If the whole contract is void, every part must be so. I refer to the case cited by my brother Hullock; [probably *Bartlet* v. *Vinor*, Carth. 251. and *post*, 368.] yet I will take the liberty of adding one *dictum*, on account of the great names from whence it comes—the Earl of Mansfield and Bishop Stillingfleet. Lord Mansfield, in the case of *The Bishop of London* v. *Ffytche*, is reported to have expressed himself as follows." (*His Lordship then quotes what is said by Lord Mans-*

were parties to the agreement, and demands judgment, because it was upon a contract of simony, which is against law. The plaintiff demurred, and adjudged for the plaintiff, *because simony is not against our law*, and *no such contract or obligation is made void by any statute in our law*, nor *is it averrable that the money is for other cause than the obligation expresses*. *Oldbury* v. *Gregory*, Mo. 564. pl. 769. Pasch. 40 Eliz. C. B.

This case denied to be law. Chancery would compel a discovery of the consideration of such a bond.

Powell Justice denied this case of *Oldbury* v. *Gregory* to be law, and cited a case where, in an action on such a bond, defendant brought a bill in Chancery against the plaintiff, and because the plaintiff could not give a good account of the *cause* of the taking such bond, the court granted a perpetual injunction. *Anon.* 12 Mod. 505. Pasch. 13 Wil. 3. in C. B.

Bond before presentation, to resign when the patron's son should be capable, lawful.

Debt upon an obligation of 1000 marks, conditioned. Whereas the obligee had procured from Queen *Elizabeth*, letters of presentation to the church of Stretham, and was to present *Lawrence*, intending, when his son *Johnes* should be capable, to procure another presentation of him to the said church, if the said obligor within three months after request, upon his presentation, admission, institution, and induction to the said church, should resign his benefice absolutely: That then the obligation shall be void. The defendant pleads that he was not requested: And issue joined thereupon and found for the plaintiff. And moved in arrest of judgment. 1. That it appears, by the condition of

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field, see *post*,) and continues, "The opinion expressed in these points, appears to me so clear, that I feel entire confidence that no scepticism can doubt it, and no subtlety confuse it. I assume, therefore, that a decision against the validity of the presentation in the great cause so often alluded to, was in effect a decision against the bond of resignation which had been there given; or in other words, against a general bond of resignation." 3 Bing. 563.

The author seems to have thought that the opinion of the judges as to a point of law, is necessarily binding upon the House of Lords; but it is conceived that these learned persons are called upon to assist, but not to govern, the decision of the highest court of judicature, and that there is full authority in the House of Lords to decide contrary to the opinion of all the judges, as they did in the case of *Fytche* v. *the Bishop of London*. Although it was at one time doubted, (see *Baynham* v. *Guy's Hospital*, 3 Ves. 295.) yet it is now certain, that the certificate of the judges of a court of common law, does not bind a court of equity. *Maxwell* v. *Ward*, 11 Pri. 16. *Lansdowne* v. *Lansdowne*, 2 Bli. 36; and it would be strange, therefore, if it could bind the House of Lords. And see *Reeve* v. *Long*, 3 Lev. 400, Salk. 227. *Ed.*]

the bond, to be a simoniacal contract, and against law; and therefore the obligation void: *Sed non allocatur;* for there doth not any simony appear upon the condition, and such a condition is good enough, and lawful: Wherefore it was adjudged for the plaintiff. Afterwards a writ of error was brought upon this judgment in the Exchequer chamber, and the principal error insisted upon was, that this condition is against law; for it appears upon the condition entered, that it was for simony; which makes the obligation void. But all the judges of the Common Bench and barons of the Exchequer held, that the obligation and condition are good enough; for a man may bind himself to resign, and it is not unlawful, but may be upon good and valuable reasons, without any colour of simony; as to be obliged to resign, if he take another benefice; or if he be non-resident for the space of so many months; or, as this case is, to resign upon request, if the patron will present his son thereto, when he should be of age capable to take it. But if it had been averred, that it was *per colorem simonii, viz:* If he did not suffer the patron to enjoy a lease of the glebe or tythes; or if he did not pay such a sum of money; that had been simony, and it is possible, might have made the obligation void: But, as this case is, there doth not appear any cause to adjudge it to be void for simony: Wherefore the judgment was affirmed. *Johnes* v. *Lawrence,* Cro. Jac. 248. Trin. 8 Jac. 1. in B. R. A. D. 1610.

The preceding case in the Exchequer Chamber.

Debt upon an obligation of one thousand marks, conditioned, Whereas he was presented to the church of Stretham, in the Isle of Ely, that if he resigned the benefice within a month after request made unto him, *viz.* at the parsonage house of Stretham; That then, &c. The defendant pleads *non requisivit,* and found against him, and adjudged for the plaintiff: And error thereof brought and assigned; *First,* for that the plaintiff allegeth a request, *viz.* at the parsonage house of Stretham; Whereas, it being the place of request, ought to have been alleged precisely, and not under a *viz.* &c., *sed non allocatur:* for that is the usual course. *Secondly,* because a request is alleged, and it is not shewn, that he gave notice of the time of the request to the party; or that the party was present: *sed non allocatur:* for being alleged to be made unto him at the said place, it is to be intended he was present there: And being found precisely to have been made, therein is included that he was present, and had sufficient notice given him; otherwise they ought not to find the request. *Thirdly,* because the *ven. fac.* was *de Stretham;* it not being named as a village or hamlet, but rather as a parish: *sed non allocatur;* for the parsonage house of *Stretham* is intended to be a village: and a parish and village are intended all one, if the contrary be not shewn. *Fourthly,* it was moved that the bond was made for simony, it being to compel him to resign: *sed non allocatur;* for it is not simony, but *good policy to tie him to resign;* and if it

were, it is not material: Wherefore the judgment was affirmed. *Lawrence* v *Johnes*, Cro. Jac. 274. Pasch. 9. Jac. 1. This case was determined twenty-eight years after the statute against simony. It was first determined in the King's Bench; from thence it went by writ of error to the court of Exchequer Chamber, and there it was unanimously decided by all the judges, that such bond was good. Although this determination was twenty-eight years after the enacting of the statute, it may be considered as a cotemporary exposition, and cotemporary expositions have always had the greatest weight. At that time Lord Coke presided in the Court of King's Bench, and Sir Henry Hobart in the Common Pleas. Lord Coke, in his reading upon the statute against simony, says he was a member of parliament at the time when that act passed, and that he noted well the proceedings of the house; and yet he concurred in opinion with the other judges, that such bond was valid. *Per* Mr. Justice Heath, *Bishop of London* v. *Ffytche*, Cunningham, 73.

Bond before presentation, to resign after three months' notice, unlawful.

It was said by the court, upon evidence, that if the patron present one to the advowson, *having taken* an obligation of the presentee, that he shall resign when the obligee *will*, after three months warning, that is simony within the 31 Eliz. c. 6. Sir *John Paschal* v. *Clark*, Noy, 22. Trin. 15 Jac. I. C. B. rot. 2051. This case is loosely reported, and is of very doubtful authority. See Cunningham, 100. 95. 77. 78. 108. 110. 166.

Bond before presentation to resign upon request, lawful.

Debt upon an obligation, conditioned; Whereas the plaintiff *intended* to present the defendant to such a benefice, that if the defendant at any time after his admission, institution, and induction, at the plaintiff's request, resigned the said benefice into the hands of the Bishop of London, that then, &c. The defendant, upon *oyer* of the condition, demurred generally; and this was argued by Grimston for the petitioner, aud by Calthorp for the defendant, who shewed that the cause of demurrer was, for that, the condition of the bond being to resign upon request of the patron, it is simony, and against law; so the bond void. But all the court conceived, that if the plaintiff had averred, that the obligation was made to bind him to pay such a sum, or to make a lease or other act, which appears in itself to be simony; then upon such a plea, peradventure it might have appeared to the court to be simony, and might have been a question, whether such a bond for simony should be void? But as it is pleaded by way of demurrer upon the *oyer* of the condition, it doth not appear that there is any simony; for such a bond to cause him to resign *may* be good, and upon good reason and discretion required by the patron, (*viz.*) if he be non-resident, or takes a second benefice by a qualification, or the like; and a precedent was shewn, in *octavo Jacobi*, betwixt *Johnes* and *Lawrence*, where such a bond was made to resign a benefice upon request, when the son of Johnes came to be twenty-four years of age, to the intent

that he might be presented unto it: And it was adjudged good in the King's Bench, and affirmed in a writ of error in the Exchequer Chamber. And of this opinion was all the court; whereupon judgment was given for the plaintiff. *Babington* v. *Wood*, Cro. Car. 180. 9 Car. I. B. R. A. D. 1633. Hutt. S. C., accordingly; and says, that upon error brought in the Exchequer Chamber, the judgment was affirmed. Jo. 220. S. C. accordingly, and that it was affirmed in error upon viewing the precedent of *Johnes* v. *Lawrence*.

Bond of resignation said to be adjudged good a dozen times.

Error of a judgment in C. B., in debt on obligation, conditional to resign on request; the defendant after *oyer* pleads resignation, to which the plaintiff replies he did not resign, *et hoc petit quod inquiratur*, to which the defendant demurs, because the condition is void. And *secondly*, the resignation is triable by certificate, and not *per pais*; Winnington *contra pro* defendant in the writ of error; and *per curiam*, it hath been above a dozen times adjudged, that the condition is good, and they also inclined the resignation should be tried *per pais*, and not by certificate. But *adjornatur*. *Baker* v. *Watson*, 2 Keb. 446. Hil. 20 and 21 Car. II. B. R.

The preceding case differently reported.

In debt upon bond, conditioned to resign upon request; the defendant pleads that he did resign according to the condition, which was found against him; and judgment for the plaintiff. The defendant brought a writ of error, because it was a simoniacal condition; but the judgment was affirmed, because the condition is good. Raym. 175. Hil. 21 and 22 Car. II. B. R. *Watson* v. *Baker*, Sid. 387. *pl.* 24. S. C., but reports that the defendant pleaded in C. B., *quod resignavit*; to which the plaintiff replied, *non resignavit*; whereupon the defendant demurred generally; And that judgment was given in C. B., for the plaintiff upon this single doubt, *viz.* whether the resignation here shall be tried *per pais* or by certificate? And they held that it should be tried *per pais*, and that the writ of error was brought hereupon in B. R., and that this was the matter insisted upon in the writ of error, which he himself argued, and there gives his argument, and concludes, that the cause was compromised, and the court gave no opinion in it. [And in Sid. there is nothing mentioned of the point of a simoniacal condition.] 2 *Keb.* 446. pl. 12. *Baker* v. *Watson*, S. C. in B. R., and reports that the court held the condition good; and inclined that the resignation should be tried *per pais*, and not by certificate. *Sed adjornatur*.

Bond to resign upon request, doubted to be lawful.

Upon a motion to dissolve an injunction granted to stay proceedings in an action on a bond given by an incumbent to his patron, that he (the incumbent) should resign on request, Lord Keeper North said he was not satisfied that such a bond was good in law: The precedents

that were in the case were not directly to the point, whether such bonds are simoniacal or not: He therefore directed that the plaintiff should declare on this bond, and the defendant plead simony, and after that and judgment at law come back to the court. *Grahme* v. *Grahme*, 1 Vern. 131. Hil. 1682.

Chancery will prevent an ill use being made of such a bond.

The defendant, patron of a church in Gloucestershire, took a bond from the plaintiff to resign upon request. Upon hearing the cause, a perpetual injunction was decreed against the bond; for the court and all sides agreed that the bond was good; yet if the patron made use of it to his own advantage, by detaining tithes, or the like, the court would relieve against the bond; and in this case the patron did detain his tithes from the plaintiff, whom he had presented; he in his answer pretended a *modus decimandi*, but made no proof of it: and being patron of several other churches, had taken bond from those he had presented, and made an ill use of it. 2 Chan. Ca. 186. Mich. 2 Jac. 2. in Chan. *Durston* v. *Sands*, 1 Vern. 411. pl. 387. S. C. Accordingly, by reason of the *ill use the patron made of the bond.* 2 Chan. Rep. 398. S. C. and adds, that upon the defendant's giving notice to the plaintiff to resign, the plaintiff did accordingly resign the rectory into the hands of the bishop, who refused to accept the said resignation, and ordered the plaintiff to continue to serve the cure; declaring he would never countenance such unjust practices; but ordered his register to enter it as an act of court, that the plaintiff has tendered his resignation, but that the bishop had rejected it. And that the defendant insisted, that the reason of his arresting the plaintiff on the said bond was his non-residence and litigious carriage to the parishioners. But a perpetual injunction was awarded. S. C. cited Prec. Chan. 513. pl. 317. Pasch. 1719. in the case of *Hawkins* v. *Turner*. In which last case it was agreed, that a bond given to resign on request should not be made use of to turn out the incumbent, unless for non-residence or some great misdemeanor; nor would the ordinary accept of a resignation offered by the incumbent, without some such cause shewn; but if the patron made use of the bond *to extort money* from the incumbent, without some such cause shewn, this court would grant an injunction.

Bishop refused to accept resignation.

Equity allowed a demurrer to patron's bill for discovery and relief, where resignation bond had been surreptitiously obtained by parson.

In *Bainham* v. *Morris*, 2 Vern. 242, lord commissioner Hutchins cited the case of Mr. Fortescue, who had presented a parson to a living, and took a bond from him to resign on request, at any time within seven years. Mr. Fortescue's housekeeper, being the parson's sister, got the bond and delivered it over to her brother. Bill to discover this matter and to be relieved. The defendants demurred, and the demurrer was allowed.

Simoniacal contracts always held void.

It was said by Lord Chief Justice Holt, that every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute. As for instance, in the case of simony, the statute only inflicts a penalty by way of forfeiture, but doth not mention any avoiding of the simoniacal contract; yet it hath been always held that such contracts, being against law, are void. *Bartlet* v. *Vinor*, Carth. 252; Mich. 4 W. and M. B. R. *Vide ante*, 361.

Bond for resignation of a benefice, good.

In an action of debt upon a bond for a *great* sum of money; the defendant pleaded that the condition was for a parson's resigning his benefice; and on demurrer, *Powell* and *Blincow* being only in court, *jud' pro quar'*. Powell said, I am of opinion, that when first the judges have held these bonds good, if they had foreseen the mischief of them, they would have been of another opinion; but now that opinion has prevailed, and it is supported only by the *possibility*, that it *may* be to an honest intent; as that the patron may have a son of his own, capable of the benefice; or that he should voluntarily resign in case of non-residence, which may rather argue care in the patron, than any corruption of simony; but if these were the real motives, why should they not be specially expressed in the condition? But such a bond as this is to resign generally; it may be the parson could not have the benefice without it; he is thereby tempted to strain a point rather than be without a living, and the common use of them is to have the money; and sure if the thing be simony, a bond for it will be void. And my Lord Coke's notion is not law, where he says, that since the bonds are good, there shall be no averment of simony upon it [2 Bulst. 182]. 31 El. makes the church void, and gives the presentation to the king; and simony was against law before, and simoniacal agreements were void before that statute, though simony itself was only punished in the spiritual court. And he said the case of *Gregory* and *Oldbury*, *supra*, 362, was not law, Moor, 641, where there is an averment of its being a simoniacal contract, and the patron and incumbent are privies to it; and if there be any simoniacal consideration, they both must know it. And he quoted a case where, in an action on such a bond, the defendant brought the plaintiff by bill into Chancery; and because he could not give a good account of the cause of taking such a bond, a perpetual injunction was granted. But here we cannot set aside this bond without a *special cause* shewed in pleading, which is not done. *Blincow* said, you assign no simony, but put it upon the plaintiff to shew none, which he need not do, because we cannot *intend* it to be such, since it *may* be otherwise; and here is a particular circumstance why it should

If the penalty

not be thought simony here, because it is in a sum much above the value of the benefice; if indeed it had been for a sum of less value, it might be intended perhaps the parson would rather pay it than resign; and he remembered Justice *Twisden* said he had known such a bond held good twelve times; so it would be hard to oppose it now, there appearing no simony in the condition, the defendant not averring any. *Anon.* 12 Mod. 504. in C. B. Pasch. 13 Wil. 3.

be much above the value of the benefice, simony is not to be supposed; but if it be less, it seems otherwise.

The guardian * of an infant presented to a living, and took a bond from the incumbent to resign within two months after request of the patron or his heirs, *it being designed that he should have the living himself when capable.* The patron afterwards died an infant at the university, leaving two sisters his heirs, who pressed the incumbent to resign, and for not doing it, put the bond in suit and recovered judgment; and this bill was brought to be relieved against the bond and judgment. And it was proved in the cause, that they had treated with the incumbent to sell him the perpetual advowson; and had said that if he would not give 700*l.* for it they would make him resign. Lord Keeper said, the proof in this case lies on the defendants' part, and unless they make out some good reason for removing him, he should certainly decree against the bond. Bonds for resignation have been held good in law. The statute of 21 Eliz. against simony made the penalty upon the lay patron; and he did not remember any case of resignation bonds before that statute, and they have been allowed since only to preserve the living for the patron himself, or for a child, or to restrain the incumbent from non-residence, or a vicious course of life; and if any other advantage be made thereof, it will avoid the bond; and where it is general, for resignation, yet some special reason must be shewn to require a resignation, or he would not suffer it to be put in suit. If it should not be so, simony will be committed without proof or punishment. A particular agreement must be proved to resign for the benefit of a friend that would be presented, and without such agreement the bond ought not to be sued, but for misbehaviour of the parson; and here are proofs in this case of endeavours to get money out of the plaintiff, and decreed a perpetual injunction against the bond, and satisfaction to be acknowledged upon the judgment; and the plaintiff to give a new bond of 200*l.* penalty to resign; but that not to be sued without leave of the court. *Hilliard* v. *Stapleton,* Eq. Cas. Abr. 86, pl. 3; Mich. 1701.

Court of equity will not suffer a general bond of resignation to be put in suit without some special good reason.

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* The infant should present, of what age soever he be. See Noy's Max. 130 (*b*), 9th ed. *Arthington* v. *Coverley,* 2 Eq. Cas. Abr. 518; and S. C. *infra.*

Proof of misbehaviour makes bond good.

The defendant, on presenting the plaintiff to a living took a bond from him to resign, and after put it in suit and recovered, and levied 98*l.*, and the plaintiff's bill was for relief. The defendant did not by answer pretend any misbehaviour, yet examined to several misbehaviours. And it was urged, that these depositions could not be read, because those misbehaviours were not in issue; and so inclined my Lord Keeper: but after allowed them to be read, and founded his decree upon them. *Hodgson* v. *Thornton*, Eq. Cas. Abr. 228; Hil. 1702.

A worthy man will not give a general bond of resignation.

A resignation bond comes as near simony as can be; for it is easy to secure a round sum by such a bond. I do not approve the giving or taking it, and a worthy man will not give it; *per* Holt, Ch. J. *Swain* v. *Carter*, Comb. 394; Mich. 8. W. III. B. R.

Court of equity will not permit an ill use to be made of a bond of resignation.

Capel, on presenting Peele to a living, took a bond from him to resign when the patron's nephew came of age, for whom the living was designed. When the nephew was of age, instead of requiring a resignation, it was agreed between them all, that Peele should continue to hold the living, paying 30*l. per ann.* to the nephew. Peele makes the payment for seven years, but refusing to pay any more, the patron puts the bond in suit: and then Peele comes into this court for an injunction, and to have back his 30*l. per ann.* On the hearing, the Chancellor granted the injunction, not (as he said) upon account of any defect in the bond itself, which he held good, but on account of the ill use that had been made of it; and as to the money, it being paid upon a simoniacal contract, he left the plaintiff to go to law for it. *Peele* v. *Capell*, Strange, 534, 9 Geo. I.

Special bond of resignation, good.

Debt on bond, conditioned to resign a benefice, and the court refused to let the defendant's counsel argue the validity of such bonds, they having been so often established, even in a court of equity. And also where the condition is general, and not barely to resign to a particular person. *Peele* v. *Earl of Carlisle*, Strange, 227. Mich. 6 Geo. I.

Bond to resign a living upon request, valid.

In an action of debt upon a bond, the condition of which was, that the defendant should resign a living upon request; the plaintiff declared, as administrator with the will annexed of Catherine Wyndham; and alledged, that the two persons appointed executors by her will were both dead. Upon demurrer to this declaration, it was holden to be good. And by Ryder Ch. J. The counsel for the defendant did begin to argue against the validity of this bond; but as it hath been frequently holden, that a bond to resign a living upon request is valid, it was improper for the court to permit that point to be argued. *Wyndham* v. *Bowen*, Sayer, 141. Trin. 28 Geo. II. 1754.

Bond to resign on request, lawful.

An action of debt being brought upon a bond in the penalty of 5000*l.* and *oyer* being prayed of the bond, it appeared, from a recital therein, that Robert Hesketh, the plaintiff, had presented John Gray, the defendant, to the vicarage of Steyning, in the county of Sussex; and

that it was agreed between them that the said John should, within three months after the expiration of six years, to commence from the day of the date of the bond, at the request of the said Robert, his heirs, executors, administrators, or assigns, resign and deliver up the said vicarage into the hands of the proper ordinary, so that it may become vacant, and the said Robert, his heirs, executors, administrators, or assigns, may present anew. It likewise appeared, that the condition of the bond was, that if the said John shall, within three months after the expiration of six years, to commence from the day of the date of the bond, at the request of the said Robert, his heirs, executors, administrators, or assigns, resign and deliver up the said vicarage into the hands of the proper ordinary, whereby it may become vacant, and the said Robert, his heirs, executors, administrators, or assigns, may present anew, then the obligation to be void. The defendant pleaded, that he did, within three months after the expiration of the six years mentioned in the condition of the bond, at the request of the said Robert, offer to resign and deliver up into the hands of Matthias, Lord Bishop of Chichester, who was the proper ordinary, the said vicarage, for the said ordinary to accept the same, whereby the said vicarage might become vacant, and the said Robert might present anew; and that the said ordinary did then refuse, and from thenceforth hitherto had refused to accept such resignation. Upon a demurrer to this plea, it was holden to be bad; because it is not therein averred, that the bishop accepted the resignation. And by Ryder Ch. J.—The defendant, by undertaking to resign, so that the vicarage may become vacant, and the plaintiff may present anew, has undertaken for the bishop's acceptance of a resignation; which, according to what is laid down in *Fane's* cases, Cro. Jac. 198, is necessary to the completion of a resignation. Several cases have been cited, in which it has been holden, that if a third person, who is a trustee for the obligee, refuse to do an act, for the doing of which the obligor has undertaken, the penalty of the bond is saved; and in order to bring the present case within the reason of those cases, it has been said, that the bishop is to be considered as a trustee for the obligee. If the bishop were a trustee for the obligee, it would be in the obligee's power to compel him to accept a resignation; it being always in the power of a *cestui que trust* to compel his trustee to execute the trust: but it is not, in the present case, in the power of the obligee to do this; and, consequently, the bishop is not to be considered as a trustee for the obligee. We are of opinion, that the bishop is, in the present case, a stranger to the obligee; and if this be so, it was incumbent upon the obligor to procure his acceptance of a resignation. In 1 Roll. Abr. 452, 5 Rep. 2, and 1 Saund. 216, it is laid down, that if the obligor undertake for the act of a third person, who is a stranger to the obligee, it is incumbent upon the

Parson bound in a bond to resign a living, must procure the bishop's acceptance of the resignation.

obligor to procure the act to be done; unless there were, at the time of entering into the bond, an impossibility of doing the act, or unless the doing thereof has been since rendered impossible by the act of God, or by the act of law. *Hesketh* v. *Gray*, Sayer, 185. Hil. 28 Geo. II. 1755. B. R. *post*, 385. The bond was given previously to the presentation. Ambl. 268.

Another report of the preceding case.

Debt upon a bond. Upon oyer of the condition it appeared, that the obligor had been presented to the living of Staining by the obligee, and had agreed to deliver it up into the hands of the ordinary, within three months after the expiration of five years, at the request of the plaintiff, his heirs or assigns, or upon proper notice in writing, so that a new presentation might be made. And after this recital of the agreement, the condition was, that if the defendant did deliver up into the hands of the ordinary the said living, so as that the same might become void, then the obligation to be void. The defendant pleaded, that he did offer to resign absolutely the living, and that he delivered the resignation to the ordinary, that he might accept the same, and the plaintiff make a new presentation, but that the ordinary refused to accept it. He pleaded further, that the agreement was corrupt, and that the bond was taken to keep the defendant in awe, and, therefore, also corrupt and void. Chief Justice Ryder delivered the resolution of the Court: The averring in the plea, that the agreement was corrupt, will not make it so; but it should be set forth what sort of corruption, that the court may judge whether simoniacal or not.

The whole court of opinion that a general resignation bond was good. Every contract to resign a benefice is void, where it is secured only by *promise*.

As to the point, whether a general bond of resignation is good, we are all of opinion it is. It was determined in the case of Lord *Carlisle* and *Peele*. But every *simoniacal** contract is void, where it is secured only by promise. Otherwise it is when a bond is given for the performance of such a contract, when the condition does not express the agreement, but is only a condition for payment of money, because we cannot go out of the written condition to vacate the obligation, and also because a specialty does not want a consideration to support it, as a promise depending only upon simple contract does. It has been objected, that these kind of bonds, when the contract appears upon the face of the condition to be for a general resignation upon request, are void: indeed, it does *look so*, but the *law is otherwise*. And as to the other objection, we are all of opinion, that the plea in bar is bad, because it is not averred that the bishop has accepted this resignation, and for these reasons; 1. Because, without the acceptance of the ordinary, the resignation is not complete, and the patron can have no benefit of

* Any instrument is void, if it be simoniacal. *Ante*, 368; *post*, 382-3, 397, 409.

such a resignation. 2. Because the defendant has undertaken for the acceptance of the bishop, as that is necessary to make a complete resignation, which he has by the condition of his bond agreed to do. 3. Because the plea does not contain a sufficient excuse for the bishop's non-acceptance of the resignation; for the defendant has undertaken that the bishop shall do it, or if he does not, he will make a satisfaction by paying money or the like to the party who is injured thereby; and this is reasonable, and is the law in such cases when the obligor undertakes for the act of a stranger. The ordinary is a judicial officer, and is intrusted with a judicial power to accept or refuse resignations, as he thinks proper. And judgment was given for the plaintiff. But it appearing, that the patron had advertised the living to be sold, and, in treating with a purchaser for it, that he had declared he asked and expected a greater price for it, as he could compel an immediate resignation: Lord Hardwicke, for this reason, and as it was making a bad use of the bond, granted an injunction to restrain the patron from proceeding further upon the bond. *Hesketh* v. *Gray*, 3 Burn's Ecclesiast. Law, 354, 6th ed. tit. *Simony*; Ibid. 322, *Resignation*, 5. His Lordship said, "these sort of bonds are held good at law, and so they are in equity, unless an ill use is attempted to be made of them, in which case this court will interfere." Ambl. 268. However, Lord Eldon says, "I doubt whether this is a proper ground of relief." *Post*, 426.

The ordinary is a judicial officer, and is entrusted with a judicial power to accept or refuse resignations, as he thinks proper. *Post*, 436, (*c*). Injunction, where patron makes a bad use of the bond.

T P. vicar of S., covenanted to permit the defendant to receive to his own use the tithes and dues of his vicarage for one year, due at Michaelmas then next, and to make a grant thereof, upon request, to the defendant for his life, &c. and that at the request of the defendant he would, by all lawful means, surrender the said vicarage, so as that the defendant might present *de novo*; and the said defendant covenanted to pay T. P. 150*l.* for and in lieu of the said tithes, &c. The plaintiff averred that T. P. had performed all on his part, and assigns for breach that the defendant had not paid the 150*l.* The defendant pleaded that T. P. died at S. before Michaelmas, *per quod*, he could not receive the tithes. Upon a demurrer, an exception was taken, that the contract in this case was simoniacal, by reason of the covenant to resign, and by consequence void. But as to that, it was said by the plaintiff's counsel, that the covenant is, that the said T. P. by all lawful means should resign on request of the defendant; which is all one in effect as if it had been said that T. P. should resign, if it might be done by lawful means; so that no resignation was to be, unless it might be by lawful means; but that had those words been omitted, the contract had not been simoniacal; for payment of the 150*l.* is a distinct and independent covenant; and the case of *Byrt* v. *Manning*, Cro. Car. 425, was cited as a case in point. And the plaintiff had judgment by the opinion of the whole court. *Pyke* v. *Pulleyn*, Lutw. 343. Trin. 5 W. & M.

Qu. whether a covenant that incumbent will, by all lawful means, resign upon request, so that patron may present *de novo*, is simoniacal.

[There is one dictum on the subject of resignation bonds, which is omitted by the author. This occurs in the case of *Layng* v. *Payne*, Willes, 575, where the Chief Justice Willes said that general resignation bonds were void, but made an exception in favour of bonds of special resignation. *Ed.*]

Thus the law stood until the great case of the bishop of *London* and *Lewis Disney Ffytche*, esquire, which was as follows. In the year 1780, the rectory of the parish church of Woodham Walter, in Essex, in the diocese of London, becoming vacant, Mr. Ffytche presented his clerk, the reverend John Eyre, to the bishop for institution. The bishop being informed, that the said John Eyre had, before the making of the presentation, given his patron a bond in a large penalty to resign the said rectory at any time upon his request; and the said John Eyre acknowledging that he had given such a bond; the bishop refused to institute him to the living. Whereupon Mr. Ffytche brought a *quare impedit* against the bishop in the court of Common Pleas. 2 Burn's Eccles. Law, 356, 6th ed. Upon which the bishop filed a bill against the patron, and the clerk presented, to discover whether the clerk had not given a general bond of resignation, in order to set up that bond as a defence at law for having refused the clerk institution. To this bill the defendants demurred. Lord Thurlow said, two objections are made to the discovery sought. First, that it will subject the defendants to penalties as a simoniacal contract. It is very clear, that if any plaintiff, for any purpose, demands a discovery which leads to a legal accusation, he is not entitled to it. If the plea can be supported from the evidence to be discovered, I must not enforce the demurrer. If there were no cases, I should think it clear, that a mere bond of resignation could not be criminal, unless it were for profit or benefit to the patron. Many cases have been determined, that the bonds were good. The effect of the determination is, that they not only are not simoniacal, but that they are not against the policy of justice. The second objection is, that the discovery is immaterial. This is the first instance of a demurrer for immateriality. If a demurrer was to a bill where the matter was obviously frivolous, the Court might interfere. Here one of the cases treats the matter as too well settled to be argued. It was argued and determined the same way. It is said, there is a difference between this and when it is between patron and clerk. I cannot bring my mind to this argument. The bishop has never been compelled to accept the resignation. The question, as decided, carries this along with it, that where the bond has been applied to a bad purpose, the court would restrain; but this is a different question, whether a man, who ought to be independent of every control but the Court Christian, shall subject himself by contract to any but his ordinary. In specie, it has never been decided that the bishop is compellable to admit the clerk, but it has been decided that the contract is not illegal. This is not stated as the ground of the pre-

Upon a *quare impedit* brought against the plaintiff, he filed a bill to discover whether the clerk presented to him by the defendant had not given a general bond of resignation, in order to set up that bond as a defence at law, for having refused him institution: Lord Thurlow decreed a discovery.

sent opinion. It is not too much to say, that where a man comes for a discovery of evidence material to his defence, the party shall not protect himself against the discovery, unless he can shew himself liable to penalties, which I think he has not sufficiently done here. There is no instance of the court having refused a discovery, because it was inconvenient to the party making it, for the plaintiff pays the costs of the application, and whether it is material or not, is chiefly for him to judge. I am of opinion they ought to make the discovery, and it will remain with another court to determine how far it is material. Demurrer overruled*. Bishop of *London* v. *Ffytche*, 1 Bro. C. C. 96.

From the real facts of the case, it seems that the bishop was justified in refusing to institute the parson, because he and the patron endeavoured to deceive him.

The real facts do not appear to be stated in Brown, for it appears from an appendix to Cunningham, p. 184, that Mr. (afterwards Sir James) Mansfield, counsel for the plaintiff in error, in his argument at the bar of the House of Lords, stated to their lordships the occasion of filing the bill in Chancery; namely, that the clerk of the defendant in error, when he applied for institution, had confessed he had executed a bond, in a large penalty, to resign the living at any time upon the request of his patron; that the bishop, for that reason, refused institution; that sometime afterwards Mr. Ffytche sent the bond, which Eyre had executed, to the bishop, *cancelled*, with an intimation, that as the impediment was thereby removed, he hoped the bishop would institute his clerk; that the bishop, conceiving the cancelling this bond was merely to destroy the evidence obtained of its existence, and that some other bond of the same nature had been or would be executed by Eyre, informed Mr. Ffytche that if he would give his word and honour that no such other bond had been or would be executed by Eyre, he would immediately institute him; and repeatedly called upon Mr. Ffytche for an answer to that proposition; that Mr. Ffytche declined giving any answer; and having brought his *quare impedit*, and the bishop being advised no defence could be made at law without proof of the bond, the bill was filed, stating the whole circumstances; and charging the cancelling of the bond for the reason above mentioned, and the execution of another bond, and praying a discovery whether such other bond did not then exist; that to this bill Mr. Ffytche demurred; but the demurrer, upon argument, was overruled, and he was compelled to answer; and in his answer he had *confessed* the first bond was cancelled with a view and design to destroy the evidence obtained of its execution;

* See the whole of Lord Redesdale's observations upon this case, by which it appears that the decision was in contradiction to the principles on which the courts have proceeded in several cases enumerated by his Lordship. Redesdale's Pleadings, 2d and 3d ed. p. 157.

and that Eyre had executed to him, as patron, *another* bond to the same purport.

1782. Held by the Common Pleas and King's Bench, that the ordinary of the diocese may not refuse to admit a clerk to a rectory to which he was presented, because he had given a general bond to resign upon the request of his patron.

However Mr. Ffytche obtained judgment against the bishop in the Court of Common Pleas. Upon which the bishop appealed to the Court of King's Bench, and that court affirmed the judgment in the Court of Common Pleas. Lord Mansfield said, the general question before the court upon these pleadings is the validity of such a bond; for as to the allegation that it tended to procure an undue influence, it is certainly too general: the undue influence ought to have been specified. I think it right to declare my assent to the opinion given by the Court of Common Pleas, of which I have seen a very full note, namely, that if any undue motive appeared in giving the bond, it would avoid it at law, as well as lay a foundation in a court of equity for an injunction. And I should also be of opinion, that if after the execution of the bond an undue use were attempted to be made of it, such as a demand of money, a claim of tithe, or for any other illegal purpose, the use actually made of it should be considered as actual evidence of the purpose for which it was given, and might be made use of in any court of law upon plea. Another circumstance mentioned in the argument is out of the case; which is, that it is simony by the canon law; for if the canon law had been pleaded ever so particularly, it would not have varied the case; for the canon law is more general than the statute. It then comes to this naked question, Is such a bond good, since the statute 31 Eliz. c. 6. by the law of England; or is it an innocent bond on the face of it? As to that point, in the time of Eliz. and in the time of Jac. 1., such a bond was holden to be legal, and so fully established, that in 1698, Bishop Stillingfleet wrote a most elaborate discourse against the decisions of the courts of common law, taking it to be fully established, but yet erroneously so. But notwithstanding the great abilities of that prelate, (and if the matter were entire there is great ingenuity in that discourse,) all the courts of Westminster Hall have uniformly holden it to be a lawful bond; and to such a degree, that in some of the last cases the Court would not suffer the point to be argued. I should have been very sorry to have followed that example in this case; because it would have deprived us of the pleasure of hearing both the gentlemen; but after having heard them, I think it is not permitted to us to go into the question: and if all the authorities be wrong I am bound: I do not think it decent to go into them. And therefore, upon the current of authorities which have expressly decided the point, I think it too clear to be argued.

Willes, J. concurred.

Ashhurst, J. I am of the same opinion. The whole tenor of the cases is so strong, that the question is established beyond controversy.

I think the different form in which this case comes makes no difference; for what is the reason assigned by the bishop for refusing to receive the presentation? It is no more than this, because the clerk has given a bond, which the courts of law have holden to be legal.

Buller, J. Nothing but the number of positive authorities would induce me to concur in the opinion of the court. I cannot help thinking there was a great deal of good sense in the opinion of Mr. Justice Powell; and I think with him, that if the judges in ancient time had seen the inconveniences that have since ensued from the use of these bonds, they would not have pronounced upon them as they did. The argument would afford a great deal of discussion. The request may be for a lawful purpose, therefore the condition shall be good. If so, why not state what that purpose is? The argument seems to me equally strong, (and that part of Stillingfleet's book does not admit of an answer,) that it may be used for a bad purpose; why not therefore bad? But upon the principles of pleading it seems a great stretch to say that it shall be taken to be confined to lawful purposes only: for the bond is to resign on request, that is, on all requests. If then the bond be to resign on all requests, can any thing be introduced on the record different from the condition? This is the way in which I should have reasoned: but so strong and so uniform a train of decisions leaves no room for the court to exercise their judgment on the reasons on which they were founded. For arguments founded on a possibility of abuse or inconvenience, are not to be adopted in contradiction to what has been established as law for a century and a half past, by such a variety of determinations. The rule *stare decisis* is one of the most sacred in the law: but if not adhered to in such a case as this, it would be very difficult to say that it ought to weigh in any. If the law be thought to be improper or inconvenient, application to correct it must be made elsewhere, and not to those who are bound by the repeated and solemn judgments of their predecessors. As to the last plea, a reason has been given at the bar, which is decisive against it; it was said that undue influence could not be defined: if it cannot be defined it cannot be tried: it is only a consequence, and therefore cannot be traversed. Then it brings the case back to the first plea.

Judges should abide by the rule *stare decisis*.

Lord Mansfield added, I forgot to make one more observation: a distinction has been made where the action is between the obligor and obligee, and this case; but there is no ground for the distinction. For in the action as between obligor and obligee, if the bond were illegal, the obligor [*quære*, obligee; see *ante*, 192, n. *] could not recover; for no man who comes on an illegal ground can ever recover. Therefore it is a solemn determination that the bond is legal.

1783.

Upon this the bishop appealed to the House of Lords; where, upon The House of

Lords have held, that a presentation, *after* a general bond of resignation, is illegal, and the bishop cannot be compelled to induct the parson presented.

debate, the lords ordered several questions to be put to the judges; who differing in opinion, they were directed to deliver their opinions *seriatim*, with their reasons. The questions were twelve in number; but divers of them going only to matter of form, the true substantial inquiry was, whether an agreement made between an incumbent and patron whereby the incumbent undertakes to avoid the benefice, at the request of the patron, be not an agreement for a *benefit* to the said patron, within the statute of 31 Eliz.? And whether, if a patron shall present to a benefice, *for or by reason* of any such agreement, such presentation will not be void? There were other questions, whether the bond was not a benefit to the patron, and whether a presentation by reason of it, was not void.

Six of the judges, namely, Mr. Justice Heath, Buller, Nares, Willes, Gould, and the Lord Chief Baron Skinner, were of opinion that the bond was not an agreement for a benefit to the patron within the meaning of the statute; and that the bond was good and valid in law. Mr. Baron Perryn was of opinion that it was a benefit, but not *corrupt*, within the statute, and that the bond was good and valid in law. They all held, that if the patron present to a benefice, for or by reason of such bond, such presentation will not be void. However, Mr. Baron Eyre was of opinion, that it was an agreement for a benefit; which avoided the presentation; but that upon the pleadings it was not competent for the plaintiff in error to object to the validity of the bond stated in the pleadings, and therefore it was to be taken to be good and valid, and not corrupt and void in law.

Mr. Justice Heath's opinion.

Mr. Justice Heath said, the common law considers advowsons as a species of real property, incorporeal rights; which from the earliest times have been objects of commerce, and under every modification of real property, not only transmissible from hand to hand, but, it is admitted, they have been the subjects of future grants. By the old law, it is true, that a presentation to a void living should be *gratuitous*; and if the presentation to such a benefice should be sold, it would not pass, because such a sale was simoniacal. But now the law permits the patron to make every possible advantage of an advowson; but considers him incompetent to determine upon the idoneity [fitness] of the clerk, and constitutes the bishop the sole judge of *his* qualification, in order that under the superintendence of the ordinary the public may be secure, that no illiterate or unqualified person may be admitted to the discharge of such a sacred trust. The policy of the law has admitted advowsons to be objects of commerce, with no other view than to admit the purchasers of them to provide for children, friends, and relations.

It is agreed by the judges, that these general bonds of resignation

are valid and effectual in law; and they have been established by a long series of decisions for near two centuries; so that at this day they cannot be called in question.

But there was a difference of opinion, whether the decisions upon these bonds were applicable to the present question? And whether the presentation being purchased by the bond is not void, as being a *benefit* within the true intent and meaning of the statute; in the preamble of which it is expressed, to be made for the avoiding of simoniacal and corrupt presentations to benefices, &c. In truth it is only an amplification of two canons to be found in Lyndewood, 108 and 281. There can be no reason why a stricter construction should be given to statutes than the canonists themselves have given to canons; and the statute avoids the presentation, when any person is presented by reason of any reward, profit, or benefit whatever.

The *literal* construction of the statute has *never* been adhered to; for instance, a patron derives a benefit by a presentation to his son, and saves a portion for a younger child, which is an advantage to him; or a bishop rewards the meritorious services of a chaplain by presenting him to a living, which is a profit, and by reason of which the presentation is made; *that* was never held to be simoniacal by canonists or common lawyers.

Another example is, the Lord Chancellor or Lord Keeper for the time being has the disposal of all the king's livings in the king's books which do not exceed 20*l.* a year. They have this privilege, to reward the clerks in Chancery. Here is an avowed reward, and the clerks must have entered into the service with that view; yet those who held the seals never thought themselves guilty of simony when they rewarded such clerks with presentations to crown livings.

This is a bond, the penalty of which is to enforce the resignation mentioned in the condition of it; and the law construes bonds according to the intention of the parties; and in all bonds with a condition, the penalty is only considered as enforcing the condition: This is illustrated by an instance drawn from a statute of usury, in case of a common bond for repayment of a sum of money with interest. The tenor of the obligation is to oblige the party to pay double the sum borrowed, if not paid upon a day mentioned. It has been made a serious question whether this is not usury? It has indeed many features of it: The answer is, the principal is not in danger; it was resolved not to be usury for this reason: it was in the power of the borrower to discharge himself by repaying the principal according to the terms of the bond; so the obligor in this case may discharge himself from the penalty by resigning the benefice.

It was further urged at the bar, that an advantage would accrue to the patron under such bonds; because it is a mere marketable com-

modity and would sell at a greater rate: The answer to this is, if the patron meant to keep the advowson, a bond is no more benefit to him than the law permits; if it be sold, it is an abuse, and may be pleaded to the bond.

Every day's experience shews, that common bonds may colour usury, and nobody ever thought of suppressing bonds for lawful interest; because under colour of them usury might be taken.

The ordinary himself has a remedy for such improper uses made of a bond. In that case they may refuse to take the resignation. Besides, the legislature has created forfeitures for such disability, which must prove to be sufficient till the legislature declares otherwise.

Mr. Justice Buller's opinion.

Mr. Justice Buller said, he had taken no small pains to find out upon what principle all these cases have gone; but he must say it has not been with much effect; for he could not find that the different authorities which were upon this subject are supported by that sense, by that reason, or by that principle, which if the case were now totally new, would govern him in his judgment, or induce him to concur in those decisions. But the authorities are so very numerous; they have arisen at so many different periods of time; all the judges for nearly two hundred years past have been so uniformly of the same opinion; the law has been received not only in Westminster-hall, but throughout the whole kingdom as perfectly settled, and mankind have so uniformly acted upon this idea, that it seemed to him, it would be very dangerous to overturn, or even to shake those authorities: For if policy, private wishes, or the hardships of a case, were permitted to weigh down judicial determinations in one instance, they might be extended to any other, and the law, instead of being a *certain* rule, would be governed by a discretion to be exercised without rule in each particular case which comes in judgment.

Stare decisis.

The bond in question is a bond with a condition to resign upon request; and the question is, whether such a bond be corrupt and illegal?

The authorities one and all have determined, that such a bond is good: and this has been decided not only in cases where it might be supposed, that the bond was given *after* the presentation, and without any *previous* agreement, but in cases where it did appear, that the bond was given *before* the presentation, and that the presentation was made in consideration of that bond.

It is determined by all the cases, that such a bond is not a *benefit* within the meaning of the statute of Queen Elizabeth: If it were a benefit within that statute, the bond itself would be void; for though this statute says the presentation itself shall be void, yet by operation of law upon the statute all considerations given for a cause prohibited by the statute will be void. This was so laid down in *Bartlett* and

Viner's case in Carthew, 282; which authority never has been contradicted; but on the contrary has always been received as the rule which ought to govern in all similar cases; the agreement not being a *benefit* within the meaning of the statute, a presentation by reason of such agreement will not be void.

If the presentation be void, it must be so because it is made upon a corrupt agreement; there is no agreement stated, but that such a bond should be given: the law has said that it is not corrupt; for if the bond itself be not corrupt, the agreement to give that bond cannot be so, and consequently this presentation is not void. His answer to the question, requiring to know, if there be no difference in law, whether the value of the incumbency be greater or less, than the penalty of the bond. The amount of the penalty, whether more or less than the value of the incumbency, will make no difference, if given for the purpose of compelling the resignation; for it is declared by law to be legal; but if it be under an agreement expressed or tacitly understood, that the incumbent should pay the money, and should not resign, that would be in effect the sale of a living, and then the bond would be corrupt and void. Now that does not appear upon the face of the bond, but must be made out by proper averments in pleading; and it must be either admitted upon the other side, or found by a jury: till such agreement or such intended use be made of a bond, it is admitted all through the cases, a bond would be good; because nothing that the law calls corrupt appears upon the face of it.

There is no difference in law, whether the penalty be more or less than the value of the living, unless there be an agreement that the parson should pay the penalty.

Mr. Baron Perryn.—If this presentation makes void the bond, it must be by force of the 31st Eliz. c. 6. s. 5. The word *benefit* in this act means a *corrupt* advantage gained by the patron for some bad purpose. Now the courts of law for upwards of two centuries past, by an uniform series of judgments by all the judges, have established *general* bonds of resignation to be valid in law. It seems to be a contradiction in terms to say, that the bond and agreement should be good, and yet the presentation void. There may be good considerations to induce a patron to present a parson: if the purpose is not expressed upon the face of the agreement, it *may* subsist upon a fair and good consideration. If it is *general*, and no purpose expressed, it *may* be for a good purpose. He was of opinion this agreement is not corrupt, or a benefit within the intention and meaning of the statute, and that by reason of such agreement, the presentation will not be void.

Mr. Baron Perryn's opinion.

Mr. Baron Eyre.—In this case the patron has presented, for or by reason of an agreement, that the clerk should give him a *general* bond of resignation; which being a profit and a benefit within the statute, his presentation is void; that is the *general* question upon this plea. This question is now for the *first* time, as far as he could learn, stated, in the

Mr. Baron Eyre's opinion, which, in the main, was opposite to the opinion of the other judges,

and was supported by no other lawyer besides Lord Thurlow.

proceedings upon this record; so as to be the point in judgment. It is a *new* and an important question in its consequences, and deserves very serious consideration. In the arguments at the bar, and in the courts of law from whence this cause comes, as far as he has been informed, it seems to have been *assumed*, that the question was to be decided by the solving another question, that is, whether a bond with a condition to resign at the request of the patron was void in law? And their Lordships' 12th question, which is upon the validity of the bond stated in these pleadings, gave a degree of countenance to that argument. The counsel for the defendant in error rested the whole argument upon the authority of a series of cases, in which it was said to have been adjudged, that these bonds were good in law; the house was called upon *stare super antiquas vias*, and a storm of indignation was raised against all those who should unsettle foundations. Without unsettling foundations, he may ask, he said, how the general doctrine, extracted from this series of cases, that a general bond of resignation is in itself *not* unlawful, applies even to prove that the bond stated in these pleadings, under the *special* circumstances of this case, is not unlawful: And he was compelled to go into the enquiry; because the question upon these bonds, proposed by their Lordships, was not any question upon the validity of such bonds themselves, but was a question upon their validity upon the particular case, and under the special circumstances stated in these pleadings. He had looked, he said, into most of the cases that have been alluded to, and found that instead of deciding the question upon the validity of such a bond, given under such circumstances as are disclosed in these pleadings, they are express authorities to prove, that such question remains to this hour open to discussion. From the uniform language of the cases, if you object to the validity of these bonds, you must take the circumstances upon which the objection is founded, that the court may judge whether it is sufficient. Therefore, at once to distinguish this case from all the cases cited, he believed he may hazard the assertion, namely, that *all* the circumstances were stated for the *first* time upon this record. In the case of *Hesketh* and *Gray*, (*supra*, 371.) the defendant made, for the first time, an attempt to introduce special matter upon the record. He pleaded it was corruptly agreed, that a bond should be given; the court rejected the plea, and the reason assigned for rejecting it was, the assertion in the plea, that the agreement was corrupt, which would not make it so; it should be set forth, what sort of corruption it was, that the court may judge, whether it was simoniacal or not. From one of his learned brethren, the house had heard a particular state of that plea; from that state, thus much he learned, and thought he was confident of, that it was not a plea upon the statute of Elizabeth: it was a plea, that it was corruptly agreed, that the patron should present; that the

clerk might be instituted, but that the clerk should not hold it; to secure that agreement, the bond was given, which is a very different case from the agreement, that the patron should present, and that for that presentation the bond should be given, which is a case that arises upon that statute. In the present case it is set forth what sort of corruption it was, that is imputed to this bond and to this presentation: it is this sort of corruption; the patron has made the giving a bond the *price* of his presentation: in this respect, therefore, the case upon this bond is substantially different from any one of the adjudged cases, and it is perfectly *new*. The validity of this bond was, in his apprehension, not in issue between the parties upon these pleadings. The plea in this case is a plea upon the statute of queen Elizabeth, and the plea applies not only to impeach the bond, but to impeach the presentation which has been made in this case. It impeaches the presentation, not by the medium of impeaching the bond, but by shewing that this bond, good or bad, was entered into under certain circumstances, which, not for their intrinsic demerit, but by force of the statute of Elizabeth, should avoid the presentation. As all the cases adjudged upon resignation bonds have been hitherto sustained, because they were not in fact impeached for any matter introduced *out* of the bond; so here the bond stated in these pleadings must be taken to be good as far as respects this plea, because upon this plea of the statute of Elizabeth the point of the plea does not go to impeach the bond. The bond is called indeed, corrupt, but the person who pleads it, takes no conclusion of law upon that corruption, to avoid the bond; but his conclusion of law is, that by reason of that bond so given, good or bad, the presentation is void. He had very serious doubts, he said, whether in such a plea, and in such a suit in *quare impedit*, it would be possible, by any plea that could have been introduced, to have brought the validity of that bond properly in judgment before the court; and therefore with this explanation it is, he begged leave to answer, that the bond stated in the *first* plea upon these pleadings must be taken to be good and valid, and not corrupt and void in law. He observed, that, in his apprehension, the argument of the validity of resignation bonds, and of the validity of presentations, made the consideration of such bonds, is not just. If the cases upon resignation bonds do really conclude nothing to the question upon the presentations under the statute of Elizabeth, they are but so much rubbish thrown over the question, which should be cleared away, that the true ground of the question may be fairly stated to their Lordships' view. He was bound to undertake the labour of this work; because he professed not to disturb the cases upon resignation bonds as far as they have gone, and he must therefore take upon himself to distinguish those bonds from the case which is now in judgment; and he must sustain his opinion upon the

The patron makes the giving a bond the *price* of his presentation, which is different from the other cases. The validity of the bond not in issue.

In *quare impedit* it is impossible to bring the validity of the bond in judgment.

Mr. Baron Eyre did not intend to disturb the decided cases upon resignation bonds, but distinguished this case from them.

several topics, and the several questions which their Lordships have been pleased to call upon the judges for answers to, upon the ground of that distinction. By the statute of Elizabeth it is enacted, that a presentation made for profit, reward, or promise, should be void. Whether before the making this statute the accepting of a profit for a presentation was *malum in se*, at common law, or *malum prohibitum* by the canon law, or lawful by both laws, is not material; it is now *malum prohibitum* by the statute, under a penalty; if it was unlawful *before*, the statute is accumulative in respect to this penalty of avoiding the presentation: if it was lawful before, it becomes accumulative *sub modo*, and *quoad* the presentation, to the extent of rendering it void and unlawful.

In the case of *Oldbury* and *Gregory*, *supra*, 362, he really thought the Judges mistook the nature of it; he rather took it to be a case for the payment of a sum of money, and not a condition to resign; that case was precisely the case he should have put; it was a case on condition to pay a sum of money at a day certain; the defendant pleaded that the money was agreed to be paid for the resignation of the benefice by the parson, to the intent that another should be presented to it, and shewed that the parson and the patron, the obligor and the obligee, were parties to that agreement; it was therefore demanded of the judges, whether, upon the contract being simoniacal and against law, this should avoid the bond? The plaintiff demurred, and it was adjudged for the plaintiff, because simony is not against our law, nor is any contract or obligation of this kind made void by any statute in our law; also the case does not shew that the money was for any other cause than the bond expresses: the condition was to pay a sum of money: they attempted to aver by the plea what the true consideration was. That case has been in modern times treated somewhat harshly; it has been said not to be law; except it falls into the common error of denying there could be any averment against the bond, he was extremely inclined to agree to the law of that case, that simony is not against our law, and that there is not any contract or obligation against simony made void by any statute in our law: such was the opinion of Sir Edward Coke upon the statute. 3 Inst. 153. One of his learned brethren was disposed to think, that these cases of resignation bonds have resolved that they are not simoniacal within the statute of Elizabeth. He begged leave to observe, that such a question never could arise in any of those cases, because the statute of Elizabeth never could be applied to avoid a bond, but in the precise case in which it would also avoid the presentation; that is, in the precise case of that bond being made the *price* of the presentation; because it is in that case only the statute of Elizabeth operates upon it. He thought he may venture to say, there is not one of the cases extant upon the subject of resignation

The statute of Elizabeth only avoids such bonds as are made the *price* of the presentation.

bonds in which it stated precisely, so that the court could consider it as the point in judgment, that that bond was given for or by reason of or as the price of the presentation; without which circumstance it was utterly impossible that the operation of the statute of Elizabeth, ever could have fallen under the consideration of the court in discussing the merits of those bonds. It would have been perfectly extra-judicial to have pronounced in such cases upon the effect of circumstances which did not exist in the case; and if to any other purpose these bonds are said to be or not simoniacal within the statute of Elizabeth, he confessed it was not to him intelligible, and certainly not apposite to the point, in order to prove that the cases upon resignation bonds may be considered as having judicially been decided upon the construction of that statute. No case that he has seen professes to have proceeded upon the ground of that statute. No case has those facts and circumstances introduced into it, upon which alone the question upon the operation of the statute could arise; and he doubted whether the statute which does not profess to avoid the contract can avoid it by a general operation of law upon securities supposed to be entered into against it. What is it in truth that those cases upon resignation bonds have decided? What have they decided directly or by any fair and reasonable inference from what has been said? It is simply this, that it is *possible* that a resignation bond, if nothing appears to be particularly stated to the contrary, *may* have been entered into for a *good* cause. Three causes are suggested, namely, to provide for a patron's son, to secure residence, and to guard against calamities. They have decided in no case in which it appeared that the patron had *bargained* for a bond. All the cases have arisen (the case of *Hesketh* and *Gray* only excepted, which does not come up to the point in question) upon the face of the condition itself. He was very ready to admit, that it was extremely probable that in every one of those cases upon resignation bonds, in truth and in fact, there was a bargain for the bond, and that it was, as between the patron, and obligor of that bond, the *price* of his presentation; but it could not possibly be intended by the court upon the case which appeared before them; which case arose singly upon the *oyer* of the condition of the bond; so much as the condition of the bond did expressly assert as the fact, so much the court would act upon; but as to any *intendment* beyond *that* which the condition stated, when the judges look out so anxiously for *possibilities* in order to support these bonds, he need not say to their lordships they were not likely to *intend* any thing, if it did not appear that in truth there was a bargain by which the bond was to be the price of the presentation. The case of *Jones* and *Lawrence, supra,* certainly comes extremely near to the point, at large, and he thought it was the nearest case that could be found. The condition of the obligation there recited, that the obligee procured the

presentation from the queen, and was to present Lawrence, pretending when his own son should be capable, to procure another presentation for him: therefore the condition of the bond went on to say, if Lawrence should resign, the bond should be void. Now here is no express stipulation; it is not stated, that it was for giving such a bond as this that Lawrence was presented; it fails in that point, which is the very point upon which this whole question turns. The parson, who wished to object to this bond, was obliged to take the case as it stood upon the condition stated upon the *oyer*, and he had not the advantage of any argument which could have arisen from the being able to ascertain, that for that presentation a contract was entered into, and therefore the bond might be voluntary; and as it did not conclusively appear that it was otherwise, the judges would not intend that it was otherwise, and such objections only could be taken as were consistent with its being a voluntary bond, not extorted, and not given as the *price* of the presentation. These bonds are so pregnant with political mischief, that it has been with great difficulty, and not entirely to the satisfaction either of the lawyers or moralists, that they have been hitherto sustained by putting a few *possible* cases in which they *might* be sustained: Determinations upon such bonds were not made in the precise case of a resignation bond extorted by the patron, as the *price* of his presentation. Determinations in cases wherein lawful motives *may* be suggested for requiring such bonds, and for accepting them, will by no means apply to the case of a direct stipulation, even if this were an action of debt upon a bond. In no view of this case has he been able to bring these authorities to bear upon the present question, upon this statute: in the arguments at the bar, he looked with anxiety for the application of those cases to the bonds in question, from an earnest desire to conform to the prevailing opinions on this subject; opinions to which no man was exposed to error more than he was, and he has revolved this subject again and again in his mind; he has read the cases over and over, and he conversed upon them, but he was at that moment unable to discover that the question upon this *first* plea is concluded, or is even touched by any of those cases. They appeared to him cases decided upon a different subject, upon a different state of facts, and upon grounds and principles of law, which, if they were well established and applied to these cases, had no relation whatsoever to the present case. Laying them therefore out of the case, the general and particular questions included in it, are by no means complicated or entangled; the statute of Elizabeth was made to enforce a very clear rule in the ecclesiastical law, that presentations ought to be *spontaneous*. To enforce this rule in a most emphatical manner, the statute has used words most extensive in their significations, which are the drag-net that must of necessity take in every thing that falls in its way; the words are,

"If any person for any sum of money, reward, gift, profit, or benefit." These are not technical words; whether in fact money, gift, reward, profit, or benefit has been received is a question, which when resolved must instantly be resolved in the succeeding question, whether the presentation made in consequence of it be or not within the statute; there is the word *corruptly* added, but as applied to this subject, every presentation which is not *gratuitous*, is corrupt. It is in no other sense that the word *corrupt* is used. The question proposed by their lordships would therefore depend, in his apprehension, upon the simple proposition of the fact: Is the possession of a resignation bond, profit or benefit to a patron? If he agrees to accept it for his presentation, is it not also his reward for that presentation? If he exacts it or accepts it for his presentation, is that presentation *spontaneous* and *gratuitous?* which goes to the very marrow and substance of this statute. It appeared to him to be a thing extremely difficult to have a doubt upon this question; in point of benefit, in every article in respect of which the patronage is valuable, it is marketable, and instantly becomes more valuable and more marketable. That a patron only wished to indulge his caprice by turning out a man, because he did not like his face, or had a better motive, that he wished to have an opportunity of preferring a more worthy man, he could confide in: these are cases that are not, he believed, within the salvo of relief in courts of equity; and yet who shall say that this power is not valuable? Even such a power being not subject to the controul of a court of equity, is valuable to those who have it: the opportunity of providing for a son or any other particular object of bounty or affection; an opportunity of enforcing residence or preventing a clerk from holding pluralities: if a patron wishes to have such opportunity, it is a benefit to him to have it; if he can have it upon any other terms than by means of making a bargain for his presentation, it is all well; so far does the nature of this bond go, considered as a mere contract to resign; but what shall we say to the money side of this obligation? The obligor will certainly go the length to pay the penalty, if he chooses to keep the living; this is a benefit beyond all possibility of doubt; is the chance that the obligor, who *may, will* so elect, worth nothing to the obligee? And why is not this chance to be estimated, which is excellently well adapted to this species of bargaining; it goes far beyond the idea of a mere assurance; for it is expressed in the condition; it is perfectly optional in the obligor whether he will resign or pay the money, and it is not in the power of the obligee to compel him in all events to resign; so that he must have this option in his contemplation at the moment he exacts this bond; he must know he leaves it to the option of another, and he must know that that option, exercised one way, puts a round sum of money

into his pocket. If the concurrence of the ordinary were necessary to give the resignation effect, then it becomes a bargain for a sum of money upon a contingency which neither party can control. In one word, he that stipulates for a resignation bond, bargains for a sum of money, or for that which to him is as valuable, and perhaps more valuable than that sum of money. Either of them is beneficial to him; both of them therefore equally forbidden by the statute. This was the opinion he had formed upon the best consideration he could give the question upon the effect of the statute.

Mr. Justice Nares's opinion.

Mr. Justice Nares said, this question arises upon the construction of the stat. of the 31st Queen Elizabeth, which was made expressly for avoiding simony and corrupt presentations: The words by which persons are prohibited to take are, "for money," &c., from whence it is plain, that the word *corrupt* is the word which relates to *every* word before specified; money, reward, gift, profit, benefit, &c., therefore the question is, Whether this bond is corrupt, or within the intent and meaning of the statute?

It may perhaps be exceeding difficult to point out the reasons upon which general bonds of resignation were originally held good. Many reasons may be suggested; amongst the rest he mentioned that such a bond was never considered in a criminal point of view, where particular people, as the sons or relations, or particular friends were intended to be promoted upon a resignation. He would suppose that the patron, at the time he gave his living to the incumbent, had a great number of children, one perhaps he intended to bring up to the church. They were of that age at that time, he could not tell which it may be that may live to be old enough, or if he lived, how far his capacity may enable him to take upon him that sacred function; and there may be other things to prevent it; and therefore it is impossible to specify which particular child it should be assigned to. If he has in his eye a relation amongst others, he cannot perhaps point out that particular relation. Another thing, he could not tell in what part of his life he may by his behaviour offend or act *contra bonos mores*; or there may be other incidents; the incumbent might go and leave his church for too long a time; therefore resignation bonds may be considered as having some little foundation at the time they were originally entered into. But that such bonds have been held good, appears from a regular train of cases in law and equity for near two hundred years, down to the present moment; and there is no positive determination against them.

He could not think this was a benefit within the intention of the statute: Certainly no parson will give a bond in a greater sum than the value of the living, but with a determination to resign that living

according to the bond; but if this penalty is stated merely as the reason to enforce the resignation, he apprehended the patron, if the incumbent refuses to resign, would be very far from having a benefit; because he took it for granted, and so this is considered, that he would rather have the bond, or agreement, or covenant, be it what it will, specifically performed, than have recourse to the money; for the living itself, to answer the particular purposes for which he receives it, may be of much greater benefit to his family, than the sum of money, if paid as a penalty, and which he could never desire to have recourse to but when he failed of the specific performance of the bond; he took it *that* was not such a benefit as would avoid the bond.

Mr. Justice Willes's opinion.

Mr. Justice Willes observed, to bring it within that statute, he apprehended the agreement must be *corrupt*; the same statute speaks of it as a corrupt cause or consideration; if an agreement be made use of to corrupt purposes, the benefit arising therefrom is simoniacal, and the contract void: otherwise it is a pure and innocent contract.

Suppose a man presents a clerk to a living, and takes a bond from him with a special condition to resign in favour of his son when he comes of age to take holy orders. From this bond the patron acquires a benefit, he acquires the means of providing for one of his children, to the ease of himself and the rest of his family; yet this benefit is never considered within the meaning of the statute to avoid the presentation, nor has the bond been held upon that account void, as it would be by considering the statute as a prohibition of all such bonds. If a bond is made use of to secure the resignation at request, it is not to secure a *corrupt* benefit to the patron. Suppose a bond for a less sum than the value of the presentation, and it should be merely for the purpose of getting the money, and not to procure the resignation; this will be considered as taking a bond for a corrupt benefit to the patron, and the bond would be void; this would be a gross abuse of the bond, and no more nor less than a direct sale of it for pecuniary and simoniacal considerations; and where the intention of the obligor and obligee appears to be such, they have always been held void; therefore he considered this as not a bond to secure a benefit to a patron unless an improper use had been made of it.

Advowsons are a species of real property continually bought and sold for money; the law allows they should; if they were to be overturned, and general bonds of resignation were in all cases to be declared void, those would become less valuable in the hands of the purchaser. For those reasons which had been given by his brethren, he was of opinion the presentations upon such bonds are not void. He always had a leaning against bonds of resignation: no man was a greater enemy than himself to them, when any improper use was made of them. Resignation bonds have been compared to marriage brokage bonds:

nothing can be more dissimilar. It is allowed bonds of resignation may be made use of, whereas marriage brokage bonds are against the laws both human and divine: and a corrupt agreement by undue influence to join persons in matrimony, who are in every respect unfit for one another, is void. Shower's Parliamentary Cases, 76: *vide ante*, 326. The same law holds with respect to bonds for part of a lady's fortune; they are fraudulent. It was argued at the bar, whether a bond of resignation given by a judge to resign, be good. If given to any body, it must be to the king; it would be bad, as it would be contrary to the act of K. Wil. which says that the appointment of judges shall be *quam diu se bene gesserint*. The resignation of a bishop is impracticable upon two accounts: his consecration, and the seat he holds in this house. In short, those appointments are the same as the land-marks of the nation; they must be supported: but these general bonds of resignation have been always supported by the unanimous voice of the courts below. He concurred with his brethren, and he may say they all concurred in considering these bonds of resignation as good.

This brought him to the last head of argument; if the bonds are good, whether the presentation will be void. It has been said, this is a new case, and although the bond may be good, the presentation may be corrupt and void in law, as being made in consideration of entering into that bond. The cases make no distinction, whether the bond is given *before* or *after* presentation, as appears by the presentation in the case of *Babington* and *Wood*, and in *Durston* and *Sands*, and *Hesketh* and *Gray*.

Mr. Justice Gould's opinion.

Mr. Justice Gould said, what sentiments he *might* have entertained in this case was of very little importance then; and though his opinion *before* any determination had been given upon these bonds might have been different, yet, in that case, he should have had great difficulty to have condemned them. He thought it would be against the spirit of the common law to *presume* any thing bad, which *can* bear a different construction, and where it *can* be applied to good purposes, to presume it intended for bad. That is the amiable temper of the law of this country; but however that may be, if the case was *new*, however strong an inclination he might feel for it, he had no right to indulge that wish. The long string of determinations of such bonds being good is the settled rule of law, and can only, in his opinion, be changed by the legislature; but that courts are bound by it, and not at liberty to depart from it. Courts of law are to take the law, and deliver it as they find it in the books; they cannot be at liberty to depart from them; and it would be attended with extreme danger to the community, and a source of the utmost confusion and injustice, if they did.

Upon this principle, a cause was determined in this house last ses-

sion, upon a writ of error from Ireland; *White* v. *White*. He would most gladly have given his opinion in affirmance of that rule which was contended for, but the contrary was become a law. Though the mind of a judge may revolt at it, he must submit to what is the settled law of the country. By the law of the land, he meant the general custom of the kingdom common to all, which is formed of the known and repeated determinations of courts of justice, that create that rule for their successors, and which the latter have no right to depart from. The people have an interest in them, and the courts of judicature are, as he may express it, trustees to preserve them invariable for their benefit.

It is objected, that it was a *price*, the consideration of the presentation; and herein he differed from all the numerous cases that have been adduced. It has been said those cases have all been upon the simple state of the condition itself entered upon the record, and the demurrer made to it. There might arise trials upon issues, such as controverting the request, or the offer of the resignation, and therefore it has in form never been set forth that the bond was made use of as a consideration of the presentation. One man executes, and another accepts a deed, *that* is the motive and consideration to the transaction; therefore the expression of the consideration in direct terms seems to make no kind of diversity: the rule of law *is expressio eorum quæ tacitè insunt nihil operatur*.

If the transaction itself imports the motive and consideration, it is precisely the same thing as if alleged in direct words: but if there had been corruption at bottom, it might in the case of such a condition be averred. We are told this in the case of *Jones* and *Lawrence*, *ante*, 363—4. The book says it was alleged, that it was for corruption and simony the bond was given, and therefore against law; but as this case is, there does not appear any cause for adjudging it simony. He took this to be sound law, and that which was known at that time, and long before, as settled law; and he believed it now was pretty universally understood in Westminster Hall to be perfectly necessary to shew a corrupt condition in order to make it void. This condition standing in the way it does, and the presumption being in its favor, the averment might be made explanatory of the true intent of the condition. For these reasons he held it, that there was nothing material to excuse the refusal shewn by this plea. The second plea does not in terms express it to be corrupt or simoniacal; but it says it was an undue power or control, an undue influence, &c. In the case of *Jones* and *Lawrence* a second benefice is mentioned. These pluralities are indulged; a patron that has a living to present a parson to, would wish the clergyman had a good character, and would wish him to reside in the parish, that the profits of the living might be spent within the

parish, to support his parishioners, and in works of charity. Another thing is mentioned in that book, to prevent non-residence and to check improper conduct. He might add one more reason that occurred to him, namely, to prevent an avoidance by cession; because we all perfectly well know that promotion is made a benefit to the bishoprick where the presentation goes out of the family, and belongs to the crown. It is said, if the incumbent is guilty of any irregularity, he may be restrained by process from the ordinary. It may call for a more speedy redress than the form of those proceedings will usually allow. He should be glad to know why otherwise did the parliament interpose by penalties to compel residence, but under certain terms, to restrain pluralities; nor does even that act of parliament require so strict a residence as a pious and well intentioned patron may expect. He should pursue this no further, but to observe, that this plea says, it was to put the clerk under an undue influence, and it does not shew in what respect it does so; it is insinuating a suspicion which is not capable of being tried by any rule of law; it may be for laudable purposes, when the contrary is not shewn.

It seems, that whether the penalty be greater or less than the value of the incumbency, it makes no difference.

If the agreement be allowable, the bond to secure the performance of it must be so too; and whether the penalty be greater or less than the value of the incumbency, it did not in his opinion make any difference: it is no more than conjecture, that if the penalty was less, the incumbent would pay it rather than resign: it is not for us to impute such turpitude in such contract, unless shewn to be so intended. Therefore he conceived that such a bond, whether such a penalty be more or less than the value of the living, (unless the contrary be shewn) can only be taken to be an *innocent* benefit.

And therefore the presentation for or by reason of any such bond will not be void; because, if admitted to be a benefit, it is an *innocent benefit.*

Argument *ab inconvenienti.*

As to the argument of inconvenience, it is forcible in law; and certainly their Lordships, after such a series of determinations, would consider the great consequence that would attend the reversing such a judgment, and oversetting what in his humble apprehension was clear law. It was impossible for their Lordships to divine what number of livings in this country may stand under this predicament, and it would avoid them all, and throw the next presentation into the hands of the crown. It would subject the patron and incumbent to the penalty of two years income, to the utmost extended value of the living: when it is to be presumed, as he supposed upon the faith of these authorities, they thought they were innocently contracting for such a bond of resignation.

Lord Chief Baron Skinner's opinion.

Lord Chief Baron Skinner said, that as the greater number of the questions which their Lordships had been pleased to propose for the

consideration of the Judges seemed to him to depend upon the same principles and authorities of law, it would be necessary to enquire into the grounds and reasons upon which those authorities have been determined, in order to see how far they apply to, and in what manner and degree they influence, the determination of the present case. The cases already decided take it for granted, that a contract or bond to resign a living was not simoniacal or corrupt, if it was made or given for a proper purpose.

Taking it for granted, that all contracts were not unlawful, and that a bond for a proper purpose *might* be given, the Judges conceived that a *general* bond of resignation, which being in itself indifferent might be applied either for a good or a bad purpose, ought to be judged of according to the intent with which it was given, or the use to which it was applied. In putting this construction upon general bonds of resignation, they adopted the rule of construction which the learned judge who spoke last alluded to, and which the humanity and the justice of the common law puts upon all acts which are in themselves indifferent; if they are capable of being applied to different purposes good or bad, legal or illegal, the presumption of law is always in favour of the good or legal purpose, unless the bad and illegal purpose be proved. And this rule of construction holds still more strongly in all cases in which the act, if it is illegal, subjects the parties to it to pecuniary penalties, personal disabilities, or forfeiture of temporal rights; all which accrue in the case of a simoniacal presentation. This was the ground upon which those determinations proceeded; whether they were founded upon true policy or not, was not his present purpose to enquire; but at the same time, and in consideration of these determinations, it must be allowed, that all of them, from the case of *Jones* and *Lawrence* down to the present time, have been in cases between the parties to those bonds, and upon questions concerning the validity of such bonds as between those parties; and that no determination has been in a case like the present, between the patron presenting and the bishop refusing to admit the clerk presented; and where a bond is intended to be given *for* the presentation. This made it necessary to enquire what had been the extent and effect of the former determinations, and what is the intent and meaning of the statute of Elizabeth, in order to see how far former decisions agreed with the present case, and the questions their Lordships have been pleased to propose. It has been determined, that a bond to resign upon request of the patron given by the incumbent, previous to and in contemplation of the presentation, is not void, simoniacal, or corrupt, as in the cases of *Jones* and *Lawrence*, and *Babington* and *Wood*.

Difference between this case, and the preceding cases.

Lord Holt, in Carthew 301, says, that any contract made about any matter or thing which is unlawful by any statute, is a void contract,

A contract made about any matter which is

unlawful by statute, is void.

though the statute itself does not mention it; for the penalty implies the prohibition. That is founded in sound policy; and if the construction contended for upon the part of the plaintiff in error be the true construction of the statute of Elizabeth, it should seem that bonds in those cases which have been determined to be good, were void by the statute; for it was recited that the benefice was vacant, and the patron intended to present to it, the parson giving the bond. Taking it then as admitted, that a general bond of resignation is a benefit within the meaning of the statute, the recital of the bond was evidence of such agreement for such a benefit, and in that case the bond was as clearly void, according to the doctrine of Lord Holt, by operation of the statute, as the presentation would be by the express words of it. But it was not necessary to draw all the conclusions introduced by these determinations; it would be sufficient for him to establish these two propositions. That the bond was given by the incumbent to the patron, previous to and in contemplation of the presentation, and so appearing in the bond itself, it is not a simoniacal or corrupt contract or agreement. And the second, that no simoniacal or corrupt intent or purpose appearing in the bond, none should be presumed.

The question upon the statute must be collected from what is professed to be the object of it. It professes in express words, as was observed by the learned judge that spoke last before him, to be for the avoiding of simony and corruption in presentations, &c. The introduction to and the conclusion of this clause shew what sort of benefit was meant by it, namely, a benefit arising from a corrupt agreement, such an agreement as in the words of the statute constitutes a corrupt cause or consideration for giving or bestowing a benefice. It was intended, in forming the statute, to express and specify every sort of simoniacal and corrupt presentation; and lest any might be omitted, the concluding words are added, any *such corrupt cause or consideration*, which explain the import of the former, and affix to them the meaning necessary to answer the purpose of the statute, which is professed to be to avoid simony and corruption.

The enquiry then returns to the question, what is a corrupt agreement? And from those conclusions and positions of law which he mentioned, and from what was decided in former determinations upon which that question must be decided, their lordships would collect that such a bond is not a corrupt agreement, and no bad purpose is to be presumed. He said, he must return to those positions he wished to determine it upon. For the ground and principle upon such a question must be the same, whether it arises upon a *quare impedit* between the patron and ordinary, refusing to admit, or between the patron and crown claiming a forfeiture, or between the patron and incumbent, in

The ground and principle of a decision must be the same, whoever may be the parties.

an action upon the penalty of a bond, or between the parties in a contract in a suit for the penalties. If it was otherwise, every contract or bond, accompanying the presentation, though made for gift, or given, and so expressed to be upon the purest motives, and to answer the best purposes, would subject the patron to the forfeiture of the right of presentation, and the incumbent to a penalty even for a *pactio honesta;* such a bond to compel residence by the rigid rule of the canonists was allowed, and it would induce forfeitures and penalties for such a bond, as it tends to accelerate the patron's right of presentation in the case of non-residence or disobedience of the law; or the forfeiture of a bond would be so far beneficial to the patron, and there would be no difference between the *pactio honesta* designed to answer good purposes, and the *pactio inhonesta*, though it was a benefit derived from that agreement. The statute means to apply to the *pactio inhonesta:* If a different construction is put on this statute, it will carry its provisions further than the statute itself proposes to extend it, and further than the object of it requires; the statute professing its purposes to be for avoiding simony and corruption in presentations, &c., would be made to vacate presentations which are not simoniacal, presentations and benefices which were not given or bestowed upon any corrupt cause or consideration.

Upon consideration of what was alluded to by the learned judge who spoke before him, that penal laws ought not to be extended beyond their natural import in a doubtful case. The penalties inflicted by this statute are exceedingly severe, not only to the patron, who loses his right of presentation; but, if this is a case within the statute, all the incumbents who have entered into such bonds, must be made to suffer as well as the patron, and to pay double one year's profit of their living, which, it is determined, must be the *full* value thereof, and be incapacitated from holding those livings any longer.

It is true, that compassion is not to obstruct justice; but he could not be persuaded to think from any thing he had heard at their lordships' bar, that the legislature, in passing this act, and in making use of such terms and expressions used in it, intended to subject to such extreme severity of punishment, any person who should be induced by a patron to do an act which the canon law of this country presumes to be done with a good intention, and for good purposes.

The bishops of Salisbury, Bangor, Llandaff, and Gloucester, spoke at some length, and urged the house to reverse the judgments of the Court of Common Pleas and of the King's Bench.

Lord Chancellor Thurlow's argument.

Lord Thurlow said, he was never fond of resorting to the conjectures of antiquarians, or that sort of learning, as to the origin of the rights of patronage, in order to build conclusions of law upon them, with respect to matters so remote, and in their own nature so uncertain.

But it seemed to him much more material to state what was the true relation between the patron and incumbent, and the right the bishop has with respect to the office of a clerk. This office in its nature is purely ecclesiastical, and is conferred by the bishop. All the right ecclesiastical which the incumbent acquires is a right conferred by the bishop: and he took it to be true, that ever since the establishment of the church of England, this ecclesiastical office was an office *for life*. It was not competent to the bishop to give it for any *less* time than for life; and it never was competent to a bishop of any European church that ever he heard of, (and he had made enquiries) to give it for any less estate, than an estate for life. The incumbent therefore derives entirely under, and from the bishop, an estate for life, grounded upon the original constitution of the office, and consequently invariable by law.

If that be the constitution of the office, by what rule or principle can it be justified at common law, that such an officer should give a bond to his patron, in order to hold the living for a *less* term than for life? The question was asked with respect to a bond given by a judge to resign. What was the answer? The bond would be given to the king; and if given to the king, it would be void: because it would render the judges dependent upon the king, instead of being independent, as the statute of king William expresses; that act making their offices *quamdiu se bene gesserint*. A master in Chancery is an officer appointed for life. Suppose the chancellor has the appointment of it: suppose such master gives a bond to resign when called upon, would that bond be good at common law? No; because it is not only contrary to the constitution of his office, but because the public has an interest in the independence of that officer, as being appointed for life, and a public law officer. His place is independent; it being *quamdiu se bene gesserint*. If he is an officer for life, how can any private man whatsoever, because it is his province to appoint him, take upon him to render that officer's situation such as the law said it should not be? He apprehended it would be extremely difficult to justify those bonds. What is the interest, and relation which a patron has to the office which hath been described, as constituted in this manner? He has purely a nomination; it is supposed to have arisen from this: When the bishops, either by the general authority imagined to reside in them, or by authority deputed to them by bulls from the pope in former times, gave the choice of appointing a clerk to those who built the church itself, or to great benefactors to the church, that they should have power to present to the bishop a fit person for him to judge of, and if he thought him a fit person that was so presented, the bishop afterwards instituted and inducted him: that is the whole of the right of the *jus patronatus*.

He was the more positive in this, because a very learned writer, who was known to interest himself on the other side, Mr. Selden, says, the office flows entirely from the bishop. The conferring of the office does not go in any sense from the patron to the incumbent; but it flows entirely from the bishop: and the patron has purely the right of nominating or presenting to the bishop for him to choose upon the subject: and Mr. Selden seems to think that when a man is once presented, as he must be by the patron, it is still by the act of the bishop he gains his admission: and whenever he grants out of that estate any thing that diminishes the duration of it, he does it as effectually, as if he had granted part of an annuity out of an estate which he could not do. He grants a beneficial interest to the person, and is so kind as to turn him into a tenant for years, which the law says he shall not be, but a tenant for life.

It is otherwise where the living is donative.

When he stated this as granting a beneficial interest, he had not yet heard what kind of answer it was possible to give it: he had been told, that in fact it was a very beneficial interest, and an argument was pressed to their Lordships' passions. The argument was addressed to the avarice of those possessed of presentations; because the presentation grew much more valuable, as it would sell for much more; and if the law, by a series of decisions, had suffered this practice, it would be unfit to rescind them, and improper to bring presentations to their original situation.

He doubted much whether any court of justice was ever moved by compassion to give judgment against law, for fear the value of the estate in question should be lessened; he believed not; and therefore till some instance of that sort appeared, he should hope that argument would not have great weight.

It has been urged to their Lordships, that these bonds of resignation were attended with no sort of inconvenience; and that has been argued with as much subtlety as any point in this debate. Nobody contends that the practice is not wicked, destructive, and pernicious to the discipline of the church, and contrary to the spirit of the law under which it was carried on.

He could produce evidence of an offer to sell an advowson upon which the purchase money was calculated, and put upon a general bond of resignation, and he knew the instances of it were exceedingly frequent. What signifies its being determined, as it was in Hobart's Reports, 165, where a man was extremely ill of a strangury at the time, so as to be in danger of death, that purchasing the next presentation under that circumstance was held to be simony? Is not a man under a bond of resignation in greater danger of the loss of it than he in the strangury, when it is his patron's interest he should not die? It is agreed upon all hands, that this is an indecent and pernicious prac-

tice; notwithstanding which, it is said there is no sort of inconvenience in it.

He was yet to learn what degree of inconvenience there could be in putting an end to these bonds. In the first place, if it be averred a bond is entered into to get time or any thing of that sort, it may be set aside; that is supposing men to deal nefariously, and to form their contracts with their original vice in them. If it is said no such contract as that actually passed at the time, and if the only contract that passed was a condition for a general resignation, and if afterwards the patron will make use of it for advantage; suppose an accommodation in the article of making an inclosure, and the arrangements being made accordingly, and that that was an article that did not exist, and was not even in contemplation at the time that contract was entered into; was he to be told, that if an averment was made, that the true consideration of this bond was to give that advantage, though it had no existence at the time of making the bond, the law will permit it to be evidence of a corrupt agreement at the time. This he put upon the supposition, the patron is so foolish as to state to his incumbent at the time he wanted it, he would turn him out if he did not allow him that kind of advantage; and where is the incumbent to be found that would offer that plea, which is false with respect to the consideration upon which the agreement was entered into at the time, and which the incumbent must know of. He had but little faith in the moral character of a man who would sign that bond, and take that oath; he would not give him credit for not pleading a falsehood, when he has shewn himself ready for swearing it. Suppose, upon a lease of tithes being out, the patron might choose to turn him out upon his not leasing them again, though he would not choose to tell him his reasons for turning him out; he might probably think it would make the next person behave better; if it is said you cannot do it at common law, but you may go into Chancery and get it done. I have not heard the learned judges answer the question, whether it is legal argument to say, such is the common law; and if the common law works a mischief, a court of equity will affect the consciences of individuals under the same contract, and make them undo that mischief the law does. He knew of no relief the Court of Chancery could give, except restraining any ill use that might be made of the bond. He would put a case; suppose the patron threatened the clerk, unless he did contract so and so, he would turn him out, because he did not like him for not doing it, and as an example for the next man whom he might present: would any learned lord lay it down that he could do that? Could you interrogate that man as to any idea he might have at the time he took the bond? Could you ask him as to any proposal of contract? Would he say any was made at the time? Can you ask him whether he would turn him out or not, for not con-

tinuing the lease, when he has had no conversation with him about it? He did not know that Chancery could do that: Chancery and common law are totally insufficient for that purpose.

He agreed with the doctrine laid down by all the learned judges, which was, the bond at this time, whatever other objections there may be made to it, or whatever other objections it may be liable to, is not capable of being avoided, but by averments of a bad consideration and use; and if you cannot aver upon it in that manner, whatever the canon law may do with it, by the common law it cannot be rescinded. It has been questioned, whether the courts ought to make a difference between these bonds and marriage brokage bonds? Abundance of cases might be put, which would be taking up too much of their lordships' time, to shew that it is impossible to avoid these bonds at law; for which many resolutions may be cited. There is a case, which he took to be a definitive one, upon that subject, in Shower's Parliamentary Cases, under the name of *Hall* and *Potter*. It was a bond full of great inconvenience, and it was said the law ought to put an end to it, being capable of being turned to much mischief by guardians, trustees, and executors, who had great power and influence with minors. It was an ill example to such persons, and it was fit a rule should be laid down universally to abolish such bonds. If the learned judges would acknowledge the infinite mischief, scandal, and prejudice, resignation bonds were capable of doing, and which they were frequently applied to, though impossible to find them out, and they were to follow the example of the marriage brokage bonds, then might Chancery afford some tolerable relief against the inconvenience of them. The case alluded to was not a nice case in itself, but it was *new:* it was determined one way by the Chancellor, another way by the Master of the Rolls, and the decree of the Master of the Rolls in the end was affirmed in that house. It was argued as here, that the bond ought not to be set aside, unless you could affect it distinctly, as if you was to plead to it at law; unless you could affect it with the avowed consideration. But it was resolved, that the inconveniences of such bonds were sufficient to set them aside.*

Resignation bonds are full as pregnant with inconvenience and ruin to the church establishment, as any of those bonds he had been mentioning, were to the civil order of society. But the Court of Chancery *has not* protected them; the consequence of that is, they are left to share such fate as they may according to the decisions of law.

To bring this question to its true point, he begged their lordships' attention to the *strict view* of the statute;—this *bond* is bad by reason of the fifth section of the statute of Elizabeth; for that section makes

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* *Vide ante*, 326.

every admission, institution, or induction void, for which the presentee has given any money or other benefit whatsoever, or for which he has given any bond or other assurance for any money or benefit whatsoever.*

This is the first section of the act, which goes to the case of bonds. Suppose the bond in question given, and the plea had been, he gave this bond in consideration of obtaining that presentation, and that the patron had accepted it upon that consideration, and that he did present him accordingly; *that* must be the plea: if it falls short of *that*, it does not come up to what it should; it does not apply to the only point that would serve to avoid these bonds.

To steer clear of the cases: Can any thing be wilder to all common appearance (he should see whether the authorities support it afterwards), than for a number of learned men, to allow such a bond is a benefit, and then to argue it is not a benefit, within the statute? Why is it not a benefit within the statute? Because it is said there are cases which have said it is otherwise (he should see that when he came to the cases); but suppose it is *res integra*, and there were no such cases as that, then the argument is this: it is a benefit, and the statute says, if it is a benefit, it shall be void.

It is said this is a benefit, but not within the statute: the statute has said, all benefits. Why is not this a benefit within the statute? Not one of the learned judges has attempted to say it is not a benefit, but they qualify it by saying it is not *corrupt*.

All they insisted upon was, although it be a bond for a benefit, and the statute in terms has condemned all benefits, this *should* not be a benefit within the statute. Such doctrine shocks, disgraces common sense; there is no reconciling it with the dignity and propriety of administering justice. Unless he could hear some argument, by which his opinion was shaken by any other consideration than that, it rather confirmed and served to make it clearer.

His opinion was, that the point in this case had never been decided. Their lordships had been told pretty roundly it had been so; but no such case was before them. No such case is to be found in any book whatsoever†. He admitted, that general writers have looked upon de-

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* *Vide ante*, 360, 361.

† It is lamentable to see a judge descend to the subterfuge and equivocating artifice of a sophistical advocate. As to the question, whether his Lordship's assertions are true, *vide ante*, 363, 365, 373-4, 377-8, 382, 391-2, 393, 394, 397-8; *post*, 410, 411, 416, 419; *et ante*, 375-6, where his Lordship admits, that "many cases have been determined that the bonds were good."

cisions to be so. When he said, that it had not been decided, it would turn mainly upon this proposition: whether in any one of the cases that had been cited, the plea was sufficient to bar the bond, upon the foundation of its having been given for the *purpose* of obtaining a presentation.

In point of fact, there had been no judicial decisions in favour of such bonds; but on the contrary, there has been a judicial determination that these bonds were void, namely that case in *Noy*. *Vide ante*, 365. He confirmed himself in that opinion by the observation made by Lord Keeper North in the case of *Grahme* and *Grahme*. (*Vide ante*, 367 *.) He lamented that the arguments in a case of this sort, where something appeared that never was yet decided, run in a circle: for that this is a benefit is allowed, and the act of parliament forbids presentations that are made by reason of any benefit whatsoever. Why not declare this to be a benefit, which *eo nomine* is prohibited by the act of parliament, notwithstanding a parcel of books one after another run into the notion that the point has been decided, which upon a closer and more exact investigation turns out not to be decided at all †.

It is said, these bonds are matters of great convenience, and it would be attended with great inconvenience, if they were abolished. He remembered an old gentleman of eighty, who said he had served upon special juries at every assize for fifty years of his life, and, thank God, he had never differed in opinion with the judge that presided. Certainly that argument will not prove that those judges have decided right: he did not think their lordships would go upon that ground in this case, and he made the same motion as the learned bishops who had already spoke upon this case before him; that this judgment be reversed, and that judgment be entered for the plaintiff in error.

Lord Mansfield's argument.

The Earl of Mansfield observed, that he thought himself called upon in some measure to say upon what ground his opinion rested, that this house should not reverse this judgment; and he owned it is upon the ground of its being a matter that has been looked upon and considered by all England as settled successively from a period of time of near two hundred years; that is, almost from the making of the statute, and been so considered and determined, by judges of all denominations.

The case stood singly upon this proposition, whether an agreement by a general bond of resignation in consideration of a presentation was by the 31st of Elizabeth, simoniacal, corrupt and void; synonimous

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* If the point was determined at law, by the case in Noy, (*ante*, 365,) why should the Lord Keeper afterwards have doubts (*ante*, 367,) whether such a bond was good in law?

† *Vide ante*, 406, *.

words; he used them as such, simoniacal, corrupt and void; that was the only question.

Was such a bond, without any other collateral agreement but the bond, from the nature of it, from the intrinsic form and substance of it, that is a bond to resign under a penalty upon request; whether such a bond was within the statute of the 31st Elizabeth, it being in consideration of the presentation, that was the question here.

Now that this question had, for above a century, been considered as settled, is clear by adjudged cases; and that upon such bond the agreement is fair and legal, and consequently neither corrupt nor simoniacal, nor within the 31st of Elizabeth.

Between whatever parties, the question must be the same.

The tendency of a corrupt agreement and the consequences of it, he thought, may appear in judicature in different shapes. It may appear as it did then, in a *quare impedit* between the bishop and person presenting: it may appear in an action between the obligor and obligee of such a bond: it may appear upon a presentation by the crown for simony: it may appear upon an information or action for the penalties inflicted by the statute; but in whatever shape it appears the question was the same.

Is the agreement corrupt? Is it simoniacal? If it is, it is followed with all these consequences; it is followed with the forfeiture of the turn; it is followed with the penalties; it is followed with the avoiding of the bond and agreement. It is true that the actions that have been tried have been between the obligor and obligee; but still the question is, is the agreement good or bad within the statute of the 31st of Elizabeth? Now two objections were made the other day, and have been very ably enforced this day, to shew that this very case was not within the authority of the cases that had been determined. He would state them as accurately as his memory enabled him: the first distinction was this; That in the cases that have been adjudged, it did not appear that the resignation bond was given *previous* to and in consideration of the presentation.

The second was this, that the bond was good, but the presentation bad; the bond being good because the 31st of Elizabeth dont say that it shall be void.

Another ground mentioned was, that in the cases adjudged, there was a want of a proper averment to bring the point properly before the court.

The first is, that it did not appear in the other cases, that the resignation bond was previous to and in consideration of the presentation. In the first place, *that* distinction is not taken in any one of the cases; nor any objection made, nor any point turning upon that objection, that it was not made in consideration of the presentation.

Another thing is, it is impossible there should be such a bond given

which is not in consideration of a presentation, and pursuant to some agreement concerning it; for would any man in his senses that has got a living, and been instituted and inducted, give a bond of resignation? It is impossible, if it went no further than that. No man in his senses would give a bond of resignation and have no view of any thing. It must be in consideration of the presentation, or there is no agreement at all to be carried into execution. But some of them do expressly mention in the condition of the bond, that they were in consideration of the presentation. It does so in the case of *Babington* and *Wood* expressly: (*vide supra*, 365:) it is said expressly in the condition, that the plaintiff intended to present the defendant, and intending to present him, he agreed to give, and did give such a bond: and in *Hesketh* and *Gray* it is particularly stated in these words, that before, &c. (*vide supra*, 371; *sed qu.*)

The next objection stated was, that the bond was good, but the presentation void: that is very extraordinary, and bishop Stillingfleet treats it as a most absurd thing indeed; that it was a good agreement in respect of the bond, and a bad agreement in respect of the presentation, and that which was corrupt in itself could be good in a bond, and bad in a presentation.

Where a contract is prohibited by statute, or has penalties annexed to it, it is void as between the parties.

He had, since he had learned any thing of law, taken this doctrine laid down by Lord Holt to be good, that is, where a contract is prohibited by a statute, or has penalties annexed to the doing it by statute, it is void as between the parties, and that no action can be brought upon it. He never heard it doubted since he had been in Westminster Hall, but that a contract respecting a matter prohibited by act of parliament is void. It is like stock-jobbing and smuggling contracts; because it cannot be relieved against in a court of justice, it being upon an illegal foundation. It cannot be defended; the court will not assist him.

The cases are at last followed by one so late as *Hesketh* and *Gray*, (*supra*, 371,) where the bond was held to be fair, not upon any particular point of pleading, but upon the cases determined before; that was in the 28th of the late king, which brings the decisions from the 8th Jac. I. to the 28th of the late king. But the conclusion drawn from those cases by the whole kingdom was very important for their Lordships' consideration; for it was most certain that they were understood to be determinations of the point, that such a bond for such a consideration was good, and not within the statute, so long ago as the year 1675, as appears in the 4th Vol. of Gray's Parliamentary Debates, when a motion was made in the House of Commons for a bill to prohibit general bonds of resignation, it having been settled and established that they were good: some little time was taken in debating it, and then it dropt, and went no further.

Argumentum à communi opinione jurisprudentium.

His Lordship would not go into the argument at large: when the matter was *intire* and no decision upon it, it was a disputable question. Their Lordships had heard from the judges on the one side the reasons upon which they apprehended the cases to have gone. They had heard very strongly upon the other side arguments to the contrary; and certainly it might have admitted a difference of opinion; but since it has been judicially established, there is a period when it is wiser, better, and safer not to go back to arguments at large. He did not know where it would lead to. Were any man to go back to argue at large upon the system of law that has been built upon the statute *de donis*, he did not know that it could be maintained upon arguments; and were any man to go back and argue upon the general reasoning and system of law upon the statute of uses, he did not know they could be supported upon general reasoning; but being once established, it is better they should stand erroneous, than by contrary judgments to overturn what has passed. Where it is without mischief to the parson, it is not of much consequence, and perhaps not much hurt in it; but where it is otherwise, it is of very serious consequence and consideration.

The object of the law is *certainty*, especially such parts of the law as are of extensive and general influence, which affect the property of many individuals, and which inflict pecuniary penalties; which create personal disabilities; and which work forfeitures of temporal rights. It was of vast consequence *stare decisis;* no man could perceive the mischief of a contrary practice; it was an object of the utmost importance to that judicature for many reasons. In the first place, because they were under no control: in the next place, if a wrong rule of law had crept in, they could rectify it in their legislative capacity; and he could by no means agree to what dropped from some of the reverend prelates, that they were not to judge by rules laid down by the law courts below*; and that they had a judgment and rules of their own. *That* he held to be quite unconstitutional. They were to give that judgment which the courts below ought to have given in their opinions. They did not sit in a legislative capacity. They were not to be governed by any other rules but the rules of law, equally belonging to the courts below and that judicature; and the judgment they pronounce must be that which the judges of the courts of law, properly informed, *ought* to have given. Consider the consequences of setting aside at this distance of time all that has passed with regard to this point.

Some of the bishops asserted that the lords were not to judge by rules laid down by the law courts below.

Many very worthy men, who never meant to make a bad use of them,

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* *Vide* the argument of Dr. Watson, (the late bishop of Llandaff,) Cunningham, 141-2; *post*, 430.

have taken bonds of resignation. He alluded to it as a matter of general knowledge. He did not care to mention names. They all heard of many; the intent of them never was for a bad purpose originally. That any bad purpose was made of them dont appear at all. He mentioned this to shew there were a number of cases, and there may be many more of persons, who had taken them, and did not mean to make a bad use of them. What is the consequence of your reversing this judgment? There were perhaps many livings in the kingdom, which would be vacated: the king has a right to the presentation *eo instante*: if upon every presentation where a general bond of resignation is given, the living is void, and the king has a right to present, the patron has incurred a penalty; the parson has incurred a penalty; and yet they have gone according to what they thought was the law of the land. If such bonds are mischievous, and are not to be encouraged, a bill may be brought in to rectify that practice. Can it be doubted or suspected, that the parliament will not do it? One of the right reverend prelates said, pass a judgment, and then pass a short bill. What! pass a judgment to do mischief, and then bring in a bill to cure it? If that judgment was then overturned, the general opinion that has prevailed so long, upon cases adjudged, whether adjudged right or wrong, it will overturn them all: and the rule he looked upon to be most applicable in this case was *stare decisis*, that is, stand to decisions where the setting them right would do much more mischief than leaving them as they were.

In case of simoniacal presentation the king has an immediate right to present.

The Duke of Richmond.—His grace said, that the case was so replete with learning of various kinds, that he was not capable of understanding the whole of it. He should therefore speak but a very few words. One of their lordships said, that the house were not bound by the decisions of the judges in Westminster Hall. They certainly were not bound by their decisions, but their lordships were bound by the same rules as they were: upon this point a great deal has been said; and though policy and justice are seldom together, they ought always to be so. Though the case was *new* to their lordships, it then appeared that the decisions have been for one hundred years unappealed from to their lordships, which was strong evidence that their lordships were not totally at liberty to reverse it, in like manner as if it was a case before them in the first instance. Some of their lordships had said that they looked upon the point as decided; if it was, he should be one that would add to the weight of numbers; as it was a point of great consequence, and there had been a great number of decisions upon it in Westminster Hall, which shew there had been an agreement of opinion; and such decisions had never been reversed in that house;

The Duke of Richmond's argument.

and therefore if they were wrong, and it should be proper to set them all right, as the learned lord upon the wool-sack observed, it should be done by act of parliament.

On a division, the judgment below was reversed by a majority of *one*.

The Earl of Mansfield (who sat as speaker, by virtue of a former commission) then said, Is it your lordships' pleasure that this judgment be affirmed? A division was demanded: For Lord Thurlow's motion, that the judgment be reversed, the number of lords was nineteen: for the Earl of Mansfield's, that the judgment be affirmed, the number was eighteen. Then it was ordered and adjudged, that the judgment given in the Court of King's Bench, affirming a judgment given in the Court of Common Pleas, be reversed. Journals of the Lords, vol. xxxvi, p. 672. Cunningham's Law of Simony, 52; 1 East, 487; 1 Bro. C. C. 96; 3 Burn's Eccles. Law, 356, 6th ed.; 2 Bro. Parl. Cas. 211; 1 Wooddeson's Lectures, 323. This decision, it has been said, was obtained by the great eloquence and ability of Lord Chancellor Thurlow, and the honest zeal of the bishops, (*thirteen* of whom were present): although it was contrary to the opinion of Lord Mansfield, and of all the other judges, except Baron Eyre. Dr. Watson's (Bishop of Llandaff) life of himself, Vol. I. 180; 6 Bac. Abr. Gwill. ed. 192, (*a*).

but the decision being contrary to the opinion of all the judges, except one, it was not generally favoured, nor likely to be extended.

It was a bold and a daring decision. For, according to the universal method of interpreting laws, custom has great weight: "*optima est legum interpres consuetudo*," is a maxim both of English (2 Inst. 18,) and Roman jurisprudence. (D. 1. 3. 37.) It is material also to remember how the statute was understood at the time of passing it: for we are often told in the writings of Lord Coke, that *contemporanea expositio est fortissima in lege*. 2 Inst. 11, 136; 4 Inst. 138. It appears, *ante*, 364-5, that his Lordship was a member of parliament when the statute against simony was made, and yet that he concurred in a judgment which declared, that a resignation bond was not simoniacal. Indeed, the decision in *The Bishop of London* v. *Ffytche* seems to have been made in order clearly to shew the omnipotence of the lords, and, as asserted by some of the bishops, to prove that the lords were not to judge by rules laid down by the law courts below. *Vide ante*, 411; *post*, 430. If the lords had paid that respect to the judgments of the law courts, which constitutionally they ought to have done, the precedents *sub silentio*, on the rule *communis error facit jus*, would have restrained their innovating decision. *Vide ante*, Vol. II. 269. The literal construction of the statute was never adhered to; *ante*, 381; and therefore, if the legislature intended that it should be understood literally, that construction had been repealed by disuse. For, although it certainly requires very strong grounds to presume a law obsolete, yet as the whole community includes as well the legislative power as its

subjects, the total disuse of any civil institution for ages past, may afford just and rational objections against inforcing the disrespected and superannuated ordinance. *Rectissimè etiam illud receptum est, ut leges non solùm suffragio legislatoris, sed etiàm tacito consensu omnium per desuetudinem abrogentur.* D. 1. 3. 32. § 1. Wooddes. Elem. Jurispru. 36-7.

The principle of the decision was not generally favoured; nor has it been generally thought that the principle was likely to be extended.

A bond to reside or resign is good. A. D. 1790.

Thus, a bond given by an incumbent to the patron *after* presentation, to reside on the living, or to resign if he did not return to it after notice, has been adjudged good.

Lord Kenyon said, "I cannot bring myself to entertain a doubt on this case. It has been argued, that the patron's right of presentation is a mere trust; it is so to some purposes, but not to all. It is a trust coupled with an interest; for it is a subject of conveyance for a valuable consideration, which is not the case with a naked trust. As soon as the defendant was presented to the living, he was bound to take upon himself all the duties of an incumbent; to reside on the living, to take upon him the cure of souls, and to keep the house in proper repair. Now this bond was only entered into for the purpose of securing a performance of all those duties, which by law, and without the bond, he was bound to discharge. I avoid saying any thing respecting the case of *The Bishop of London* v. *Ffytche*: when that question comes again before the House of Lords, they will, I have no doubt, review the former decision, if it should become necessary. It is sufficient for me, in deciding the present case, to say, that it cannot be governed by that. For here the plaintiff does not call for the resignation of the incumbent, but merely for a performance of those duties which in morality, religion, and law, he ought to do. I am therefore clearly of opinion, that a bond for the performance of these duties is not illegal."

Mr. Justice Buller said, "I cannot find any immorality or illegality in this bond. It is the duty of an incumbent to reside on his living, and to be regular in the discharge of his duty. Now this bond requires nothing more; it only requires him to do what the law would have compelled him to do without it."

Mr. Justice Grose declared himself of the same opinion. *Bagshaw* v. *Bossley*, 4 Durnf. and East, 78.

A special bond of resignation has been held good. A. D. 1791.

So in *Partridge* v. *Whiston*, 4 Durnf. and East, 359, the Court of King's Bench, understanding that it was intended to carry the case up to the House of Lords, adjudged, without hearing any argument, that

a bond *after* presentation, with a condition to resign in case the plaintiff's son took priest's orders, and should be desirous of taking the livings, and to keep the premises on the living in repair, was good; the court said, that as the case was not precisely similar to the *Bishop of London* v. *Ffytche*, they were bound by the established series of precedents. But the case does not appear to have been carried to the House of Lords.

A. D. 1801. A general bond of resignation by the master of an ancient public school, is good.

In *Legh* v. *Lewis*, 1 East, 391, it was held, that a bond given by a schoolmaster of an ancient public school, who had a freehold in his office, to resign at the request of his patron, is good at law; but equity will restrain any improper use of it by the patron. Lord Kenyon said, "I cannot see any thing illegal or wrong in the patron of this school taking a general bond of resignation from the schoolmaster whom he appoints. Many good reasons may occur for taking such a security; it enforces his good behaviour, and may tend to prevent those ill consequences which too frequently happen from the neglect of those whose duty it is to superintend such institutions. What is this but a more easy method of exercising a visitatorial authority? Such an authority must exist somewhere. If the plaintiff's ancestor founded the school, and no particular visitor were appointed, the authority descends to him as heir*. Suppose the plaintiff himself had been the founder, what could have prevented him from taking such a bond? If indeed the defendant could have shewn that any corrupt use were intended to be made of such a bond, he would lay the axe to the root: the Attorney-General would *ex officio* interfere, and upon application to the Court of Chancery the appointment would be taken out of the hands of him who so exercised it corruptly. The case of *Laying* v. *Payne*, [Willes, 571, 4,] turned out altogether upon the statute of Ed. VI. which applies only to the sale of offices of a public nature under the crown, and certainly not to an office of this description. But I never can admit that at common law a general resignation bond of an office is illegal, although the party may have a freehold in the office. In the instance of ecclesiastical livings, that is universally the case: every rector has a freehold in his rectory; yet it was never doubted but that resignation bonds for certain purposes, and up to a certain extent at least, were binding, though they put an end to the freehold. This was fully decided in *Grey* v. *Hesketh*, Ambl. 268; 3 Burn's Ecc. Law, 332, 354, 6th ed. S. C. in B. R. by Lord Hardwicke; saying at the same time, that if an ill use were attempted to be made of them, the Court of Chancery would interfere. As in *Durston* v. *Sandys*, 1 Vern. 411. Here nothing of that sort is attempted to be shewn. Nor indeed does it distinctly appear upon the plea what the nature of this office is, how constituted, or whether the appointment must necessarily be for life, without any

Lord Kenyon said, it was never doubted but that special resignation bonds were binding.

condition annexed. At present I see no grounds for deciding that the condition of the bond is necessarily illegal." Mr. Justice Grose was of the same opinion. Mr. Justice Lawrence said, "I own I have considerable doubts upon the question. The plea is rather loosely drawn, and it might have stated with more precision the nature and extent of the foundation and power of appointment; it does however state that the office of schoolmaster is an office of trust and profit, and a freehold; that every person appointed thereto has always continued for life, without any condition to resign: and that it was the duty of the plaintiff to have appointed to the office without any such stipulation. If then we are to collect from thence that the founder intended that the appointment should be no otherwise than for life*, it seems to me very doubtful how far the person who has the power of such appointment can exercise it in a different manner from what the founder intended. It is true that a bond may be taken to enforce the observance of those duties which by law are required to be performed by the appointee of an office; but then it should be so expressed in the condition. But a general bond like the present, though it may be made use of for good, may also be made use of for bad purposes; at least there is nothing on the face of the instrument to restrain the improper use of it, as there is where it is conditioned for the due performance and execution of the office. And as Lord Chief Justice Willes observed in the case referred to, such a general bond of resignation may be used as a mean of selling the office, or to favour the partial views of the patron by compelling the appointee to regulate his conduct, not by the duties of his office, but in subservience to the pleasure of his patron. The same argument was urged in favour of general resignation bonds in the case of livings, namely, that they were the means of enforcing good behaviour: but in the case of *The Bishop of London* v. *Ffytche*, Mr. Justice Buller observed on the inconclusiveness of that argument, by saying, that it might with equal force be argued, that it might be made use of for bad purposes†: it is true, that a great majority of the judges [all except one] were of opinion that such general resignation bonds were valid; but they grounded themselves upon a train of positive authorities in support of them, and not upon the reason of the thing: and it must be admitted, that if it were a new question at this day, it would be very difficult to say upon principle, that such bonds could be legal." Mr. Justice Le Blanc said, "After the determinations which have taken place with respect to general resignation bonds of livings, I cannot say that this bond is not good in point of law. It is

In *The Bishop of London* v. *Ffytche*, the great majority of the judges founded their opinion on a train of positive authorities:

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* *Vide ante*, 413, as to the heir's general visitatorial power.

† 1 East, 495; *ante*, 378.

true those determinations were impeached in the case of *The Bishop of London* v. *Ffytche*, in the House of Lords; but the decision in that case against the validity of such bonds turned ultimately upon the ground of their being simoniacal and against the statute, and not as being contrary to the general principles of the common law. (*Ante*, 385; 405.) That does not affect the present action upon such a bond relating to the office of a schoolmaster; and therefore it falls within the principle of the former determinations, that such general resignation bonds are good at law. And after such a current of authorities, I do not feel myself at liberty to canvas the grounds of that opinion."

and the decision was on the ground of the bond being simoniacal and against the statute, and not as being contrary to the common law.

A. D. 1802. Bond by a father to secure an annuity to his son, until he should be in possession of a living of a certain value; and an agreement of the same date, reciting the bond, and declaring that the son would forthwith enter into holy orders, and accept such living: Lord Eldon expressed a strong opinion, that upon grounds of public policy, by the effect of the agreement, the transaction was illegal.

In Lord *Kirkudbright* v. Lady *Kirkudbright*, 8 Ves. 51, a father gave a bond to his son to secure him an annuity, until he should be in possession of a living of a certain value; and there was an agreement of the same date, reciting the bond, and declaring that the son would forthwith enter into holy orders, and accept such living. Lord Chancellor Eldon, expressed a strong opinion, that upon grounds of public policy, by the effect of the agreement, the transaction was illegal: but the decision was upon the ground that the son had not complied with the condition; having received the annuity nine years, and being still only in deacon's orders, that the annuity was determinable by the father or his representatives. The reporter says, "the Lord Chancellor expressed great doubt as to the validity of the bond of the late Lord Kirkudbright; observing, that it was void on a great many accounts. It is a corrupt agreement for taking holy orders, such as the court ought to decree to be delivered up. The *policy of the ecclesiastical constitution* of this country requires, that a man should take orders without any reference whatsoever to considerations of this nature. There is no objection to the bond itself, except as connected with this agreement, at the same time, for a pecuniary consideration to take holy orders. Another objection to this bond is, that the father is put under these circumstances, that he is to solicit the benefit of patronage for this pecuniary consideration moving from himself: the *policy of the law*, supposing the patron to look out for persons, the best that can be recommended to him; which excludes pecuniary consideration."

On a subsequent day his Lordship said, "the court is called upon for a distribution of the assets of the late Lord Kirkudbright, and all the facts are stated. Whatever course this might have taken, whether as a claim before the master, or by a bill as a creditor by annuity under this bond, Lord Kirkudbright might have established himself as a creditor. If he could have said, the court could not look at the other instrument, upon the bond itself I see no objection to the demand; for there is no reason against such a bond by a father to pay an annuity to his son, till he is in a situation prescribed in the bond. It puts no party under any

Bond by a father to secure an annuity to his son, until

contract to do any act, either to produce the situation as clerk, or those emoluments to which a clerk only can be inducted. All beyond the bond are the spontaneous acts of the parties. But if the other instrument is to be considered with the bond, the first observation upon the instrument is, that the parties did not think this transaction ought to appear upon one instrument. They make it therefore false as to the consideration professed, *viz.* purely love and affection. The fact is not so. The agreement reciting the bond does not import that it is to have no effect upon the bond; that it has a purer nature than that of the transactions between father and son, alluded to by the Solicitor General; and not amounting to or affecting legal contract: but it is an express instrument to affect that contract, as contract: and an express declaration by the son, that, unless he should enter into that, which he was to understand to be binding as a legal contract, there was no contract whatsoever by his father."

he shall be in possession of a living of a certain value, is legal: but, it seems, a superadded contract will make it illegal.

"This case raised a very considerable and important question to the purity of the church establishment; whether the principles of it requiring from the candidates for holy orders, that they should pledge themselves solemnly as to the motives inducing them to enter into that profession, and considering the purity of their motives as one principal test of their sufficiency, if this had been an instrument between strangers, the court would support it; involving this question, whether one party might not have come here, stating, that he was willing to take orders, provided this fund was set apart; and whether he could call upon the court to set apart a portion of the assets, and decree him to take orders. The next consideration is, whether, if there would be any objection to this transaction in the case of strangers, it may not prevail between father and son. It is not necessary in this case to decide either of those questions; but I should be very unwilling to part with this subject without saying, that, however familiar it may be, that this transaction is right, I desire it not to be understood, that any court of justice has acceded to that opinion. I should have been very unwilling to put these parties to the expense of arguing the point in a court of law; and would rather have taken the short mode of speaking to some of the judges upon it. Last night I mentioned it to one of the Chief Justices; who told me, his mind was impressed with the same doubt upon this subject as mine. If the attention of people was called to this, the difficulty would not be felt. But circumstances, that are very ill reconciled to what is required upon the resignation and acceptance of livings, and the absence of all contract * by ecclesiastical men

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* It seems, that the report is not correct in this part, as the meaning of the sentence is very ambiguous.

upon these subjects, happen with a frequency making them so familiar, that men who, if well informed, would be the last to act incorrectly, will do so, unless they take the trouble to enquire whether such practices are reconcileable either to law, or to our ecclesiastical constitution."

The question of the legality of resignation bonds would never have perplexed Lord Eldon, if there had not been so many authorities declaring their legality: but he doubts whether those cases should be applied to any other case, even in *pari ratione.*

"I agree with what Mr. Justice Lawrence states in the case of the schoolmaster, *Legh* v. *Lewis*, 1 East, 391, *ante*, 412; that, whatever difference of opinion there may be upon resignation bonds, *The Bishop of London* v. *Ffytche*, (1 Bro. C. C. 96. *Cunningham's Law of Simony*, 52, 1 East, 487,) and whether Lord Thurlow and Lord Chief Justice Eyre were right or not, the question upon their legality would never have perplexed me, if there had not been so many authorities. That they were *originally against the policy of the law*, I never could doubt: First, upon this, as Lord Thurlow insisted, that it was impossible to satisfy the principle by any inquiry courts of justice could in most cases institute, whether an improper use of it had been made. Secondly, upon the much greater principle, that by the ecclesiastical establishment a clergyman receiving his benefice, so denominated because it is for life †, is under the control of his ordinary; and in that case he makes his patron his ordinary; and how they can take the oath accepting or resigning livings, if the bishop permits them to resign, which he is not bound to do ‡, that they resign without contract,

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† See 4 Bla. Com. 107; 2 Wooddeson's Lect. 6; Burn's Eccles. Law, title *Benefice*, edit. Fraser; Cowel's Interpreter, verbis "*Benefice* and "*Beneficium.*"

‡ *Quære:* To what does his Lordship refer? For the words of resignation have always been *pure, sponte, absolute, et simpliciter;* 3 Burn's Eccles. Law, 320, 6th ed. Watson's Clergyman's Law, 28, 4th ed. cap. IV; without any expression inferring that pure volition was infused into clergymen who resigned benefices by the highest and most sacred principles.

In order to shew that his Lordship's expression is unfounded, and as the precedents may be of utility, the usual forms of resignation are added.

Resignation.

RESIGNATION OF A BENEFICE, BEFORE A BISHOP.

A Form of Resignation taken before a Bishop.

IN THE NAME OF GOD; *Amen.* Before you the right reverend father in God R. by Divine Providence Lord Bishop of London, and credible witnesses here present;

engagement, bargain, or any consideration but pure volition, infused into them by the highest and most sacred principles, is for them to

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[*parson*], vicar of , and in your Lordship's diocese and jurisdiction, for certain just and lawful causes me hereunto specially moving, without compulsion, fraud, or deceit, *Do* hereby purely, simply, and absolutely give up and resign the said vicarage and parish church of , with all its rights, members, incidents, and appurtenances, into your lordship's sacred hands; with all my right, title, and possession of, in, and to the same; *And* humbly and expressly resign and cede them by these presents: *Humbly praying*, that your lordship would be graciously pleased to accept of this my cession and resignation, and pronounce and declare the said vicarage to be void and resigned to all intents and purposes; (*b*) (And to decree that an intimation of such avoidance and resignation may be issued to the patron thereof.) IN WITNESS whereof I have hereunto set my hand and seal the day of , in the year of our Lord 18 .

RESIGNATION (*c*) *of a Vicarage or Rectory* (mutatis mutandis) *before a Notary Public, when the Bishop is absent.*

RESIGNATION OF A BENEFICE BEFORE A NOTARY PUBLIC.

IN THE NAME OF GOD; *Amen.* BEFORE you [*notary*], the notary public, underwritten, and the authentic and credible witnesses here present; [*parson*], clerk, rector of the parochial church of , in the county and dio-

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(*b*) If the right of presentation is vested in the bishop, leave out the words in parentheses.

There are resignations in consideration of permutations, which are easily changed from the above by declaring the acceptance (*of the person resigning*) of the other.

(*c*) This resignation must be brought, read, and executed before a notary public, who subscribes his name thereto, and the day of the date, &c.

consider. These considerations would have influenced me in a court of justice to say, *the policy and constitution of the country* * would have left me in no manner of doubt of their illegality but for the cases. I agree, if those cases apply to that case of the schoolmaster, it is fairly reasoned, when brought within them. But, with all respect to Lord Kenyon, I doubt whether those cases should be applied to any other case, even in *pari ratione*."

A. D 1815. Condition bad in part may be

In an action of debt on bond, conditioned for the performance of several

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cese of , in the province of Canterbury, being willing and desirous, for certain true, just, and reasonable causes me hereunto specially moving; *Do*, by these presents, devest and totally exonerate myself from the burden, care, and government of the said rectory (*or* vicarage) of , and of the souls therein residing: And not being compelled thereto by force, fear, fraud, or any other sinister design; but moved thereto by my certain knowledge, deliberate mind, and free will, *Do* hereby resign the said rectory of , with its rights and appurtenances, into the sacred hands of the right reverend father in God Lord Bishop of , or to his vicar general, or to whom else it shall appertain to admit of this my resignation; *And* by these presents, openly, publicly, and expressly give up and resign all my right, title, and possession of, in, and to the same. In witness whereof I have hereunto set my hand and seal, in the presence of (*the witnesses, &c.*)

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* In *Dashwood* v. *Peyton*, 18 Ves. 27, his Lordship holds, that if a particular bond of resignation is bad, it is so either from motives of public policy, or by statute, or the common law; but that a bad resignation bond is not bad upon grounds of public policy, but bad as being a corrupt transaction. *Vide post*, 425, 427. However, in *ex parte Rainier*, in *Rowlatt* v. *Rowlatt*, 1 Jac. and Walk. 280, his Lordship said, that in *The Bishop of London* v. *Ffytche*, "the House of Lords went upon the ground of public policy, that it was against the policy of the law to permit the incumbent to be placed under such a restraint." *Vide post*, 428. But Lord Thurlow expressly declared, when that case was in the Court of Chancery, that bonds of resignation were "not against the policy of justice." *Vide ante*, 375.

things, if one of them be void, yet the bond may be good for the others. *Vide ante*, 325. Thus in *Newman* v. *Newman*, 4 Maule and Selw. 66, the bond was conditioned to pay money to the obligee upon the conveyance of an estate to the obligor, and to present the obligee's son to the next avoidance of a church, the advowson of which belonged to the estate, if he were then of age to take it; or if not, to procure the person who should be presented, to resign upon notice of the son's being qualified to take it, and to present him; the court held, that, admitting that part of the condition for the presentation of the obligee's son to be simoniacal, yet, by the rules of the common law, the bond was good for the payment of the money. Lord Ellenborough said, "What the effect of a bond of resignation in favor of a son might be, was not, I believe, touched upon in *The Bishop of London* v. *Ffytche*, though, perhaps, it might be argued that there is no reason for any distinction, because a parent would be more open to prejudice and improper bias in favor of a son than of any other person. But, admitting the condition of this bond to be ill as to one part of it, it seems that it may be well as to the other parts; for you may separate at the common law the bad from the good. Supposing, therefore, we held it to be simoniacal so far as it regards the presentation of the son of the obligee, yet for the payment of the two sums, (mentioned in the condition) it is exempt from all vice. Therefore, that objection would not be a bar to this action." Mr. Justice Le Blanc said, "The reason for making an exception in favour of a condition for presenting a son, might be, because it was not for a money consideration." And Mr. Justice Dampier said, "If a bond to resign in favor of a particular person were necessarily void, the objection would have been good in *Johnes* v. *Lawrence*. But a stipulation to resign in favor of a specified person does not seem to be open to the same objection as if it were to resign generally, because the latter makes the incumbent but a mere tenant at will to the patron. I know that since the case of *The Bishop of London* v. *Ffytche*, it has been considered, that bonds of resignation in favor of specified persons are not illegal." As to the illegality of the bond, on the ground of simony, *vide Byrte* v. *Manning*, Cro. Car. 425.

good as to the other parts; for, at common law, the bad may be separated from the good.

Lord Ellenborough seemed to think, that, perhaps it might be argued, that there is no *reason* for any distinction between the validity of a general and a special bond of resignation.

But Justices Le Blanc and Dampier thought otherwise.

In *Dashwood* v. *Peyton*, 18 Ves. 27, the question was, as to the validity of a bond of resignation of a living in favour of a particular person, and not, during his incumbency, to accept a bishopric *; and whether

A. D. 1811. Where it was doubtful whether the plain-

* On the promotion of a clergyman to a bishopric, the crown is entitled to present for the next turn, except in the case of donatives. *Vide ante*, Vol. I. 178, (*f*).

tiff, the incumbent, was not under two wills entitled to be presented free from any obligation; and not being aware of his supposed right, he had given a bond to resign a living in favour of a particular person, and not to accept a bishopric, the court refused to grant an injunction against an action on the bond.

to be considered upon the principle of marriage brokage bonds, as against public policy, or as a corrupt transaction, with reference to which the court would not act. It appeared rather doubtful whether the plaintiff, the incumbent, was not under two wills entitled to be presented, free from any obligation; that when he gave the bond, he was not aware of his right; and that he was induced to give the bond under a misrepresentation by a letter of a trustee, that there was no alternative; that they were bound to require a bond, not only for resignation, but also not to accept a bishopric. The bill prayed, that the defendant may be decreed to deliver up the bond to be cancelled, and an injunction against proceeding on it. Lord Eldon said, "the question, whether it was lawful to clog the presentation with these conditions, I shall not deal with in this court." And he refused to grant an injunction. In the course of his judgment his Lordship said, "Independent of the circumstances arising out of the will, this is the case of the presentation of a person, who, upon that presentation, has given a bond of resignation in favour of a particular individual, and a bond never [*qu.* read "not during his incumbency,"] to accept a bishopric; and supposing the case had brought forward more distinctly the objection, the ground of it is to be considered in different views."

General bond of resignation of a living said to be simoniacal.

"In the case of *The Bishop of London* v. *Ffytche*, the House of Lords held, that a general bond of resignation is bad *. That case was not followed in the Court of King's Bench with reference to a bond to resign in favour of a particular individual, the son or nephew of the person, to whom that obligation was made. In that case it was said to have been repeatedly decided at law, that a general bond of resignation is good; but I believe it will be found, that the Lord Chancellor, or that judge, who, against the opinion of the other judges, held a general bond of resignation to be positively bad, denied that such bond had

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* So far from this being the fact, Mr. Baron Eyre, the only judge who advocated Lord Thurlow's view of the question, rests the whole of his argument on this ground, that the bond, whether good or bad, was a benefit to the patron, within the meaning of the act 31 Eliz. c. 6, and therefore the *presentation was void*. See Cunningham, 89, 93, 96, 98, 99, *ante*, 385. Indeed, the plea did not go to impeach the bond, but only the presentation. For the validity of the bond could not be tried in a *quare impedit*. All the judges held the bond to be valid. *Vide ante*, 380, 386, 387, 403, 409. With this distinction, all of them, except Eyre, held, that if the presentation was bad in consequence of the simony which tainted the bond, then the bond must necessarily be void. But they denied that the bond vitiated the presentation. [This distinction is erroneous. See *ante*, 362, n. *]

been held good in any instance†; and stated, that a search would produce that result. It is very difficult also, upon the pleadings in *The Bishop of London* v. *Ffytche*, to reconcile the distinction between general and particular bonds of resignation, with the *principle* on which the House of Lords made that decision. It would not, however, become me, having regard to what is the present state of the law on this subject, to interpose in a court of equity on the ground that this is a particular bond of resignation; as, though I agree that this court, if it has a concurrent jurisdiction, is not bound to wait for the decision of a court of law, yet reasonable caution requires a court of equity not hastily to pronounce bad, a bond *understood to be good* at law; and it would at least be proper to leave that question to be reconsidered at law."

Lord Eldon admits, that by the present state of the law, special bonds of resignation are good, but wishes the question to be reconsidered at law.

"I make this observation with another view. If the particular bond is bad, it is so either from motives of public policy, or as being *understood to be bad* either by statute or the common law. Admitting the cases of relief afforded to a *particeps criminis*, there is considerable doubt, upon grounds of public policy, whether it is possible for a clergyman to come here, stating, that he had given a general, or particular bond of resignation; and on the ground that such bond was bad,

Lord Eldon holds, that if a particular bond of resignation is bad, it is so either from motives of public policy, or by statute, or the common law.

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† They did not deny that a general bond of resignation had never been held good in any instance; but only that a case under such *special* circumstances as that case, had not previously occurred. For Baron Eyre did not deny the cases cited, but said, that the question raised by the plea in that particular case was then raised for the first time: see Cunningham, 87, *supra*, 384, 386: that the cases cited "appeared to him cases decided upon a *different subject*, upon a different state of facts, and upon grounds and principles of law, which, if they were well established, and applied to these cases, had no relation *whatsoever* to the present case." *Ante*, 389. Lord Thurlow admitted that the cases relied on had been decided, but that the point in question before their Lordships was never determined. He contended, that in no one of the cases cited was the plea sufficient to bar the bond, upon the foundation of its having been given for the purpose of obtaining a presentation. See Cunningham, 163, 164, 165; *ante*, 406. Perhaps the reader thinks his Lordship's distinction to be rather refined. Indeed, he did not seem to rely on it, but rather made his stand on the ground that the practice of taking resignation bonds was "wicked, destructive, and pernicious to the discipline of the church, and contrary to the spirit of the law under which it was carried on." Cunningham, 156, 159; *supra*, 402, 405. [See *ante*, 362, n.*]

There is a degree of ambiguity in this latter expression; for it had

Qu. Whether parson, *particeps criminis*, can call on equity to free him from a bad resignation bond?
Lord Eldon doubts whether the parson can, even on the *long established* ground of relief, where the patron makes a bad and vicious use of the bond.
Qu. whether a bond not to ac-

calling on the court to enable him to hold the living, discharged of the obligation under the bond*. In the case of *The Bishop of London* v. *Ffytche*, the living and the bond went together†: the clergyman lost his living, and his bond was held good for nothing; in other cases the ground of relief was, that a bad and vicious use was made of the bond: but I doubt whether this is a proper ground of relief; and with regard to the other ground of public policy, the engagement not to accept a bishopric, that, if a ground in equity, is equally so at law. I admit the concurrent jurisdiction: but, knowing that there are in fact many such bonds, I should wish to receive information as to the law on that head, before I set aside this bond in equity on that ground; being extremely unwilling to interpose against that which, in habit and practice, it is notorious, very constantly takes place."

"Supposing the court cannot interpose on either of those grounds,

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not been contended, that resignation bonds were carried on, *under* any particular law; but that they were not *against* any law.

However, admitting that Lord Thurlow and Mr. Baron Eyre "denied that such bond had been held good in any instance," yet Lord Mansfield and all the other judges said, that it had in several instances: and they *clearly* proved their assertion, by the production of a series of cases for nearly two hundred years, which, on the rule *stare decisis*, they wished to follow, rather than introduce unlimited uncertainty and insecurity, by frittering away the force and authority of decided cases. But on this question the reader can satisfy himself by referring to the cases cited by the great majority of the learned judges. *Vide ante*, 363, &c.

* If the bond is bad, it must be by the statute; and if by the statute, it must be on the ground of being made in respect of a corrupt cause or consideration; in which case the statute declares, that every presentation, collation, gift, and bestowing, and every admission, institution, investiture, and induction thereupon, is utterly void. *Vide ante*, 361. Therefore, unless the Court of Chancery has a legislative capacity, how can it enable the parson to hold the living? As to the court discharging the parson from the obligation of a bad bond, it seems difficult to imagine of what utility the interference of the court would be; or in other words, how the court could make a bad bond worse than bad. For if the bond is bad, it is bad to all intents and purposes at law as well as in equity.

† *Sed quære de hoc:* for the clergyman was never inducted; and the validity of the bond was not in question; for all the judges held the bond to be good. *Vide ante*, 419. However, the bond never was operative, because the parson could not resign a living of which he was not possessed.

another ground is taken by the plaintiff; not disputing the legality of the particular bond, and his engagement not to accept a bishopric, he insists upon his right to have this living, as an interest by devise, standing upon implication, or the doctrine of election, given to him purely and without condition; that terms are imposed on him which ought not to be imposed; that the nature of the transaction was not dealing, treaty, and bargain, but it is a transaction in which to a man having the right, though not aware of it, this presentation was held out as a favor; and with that conception, that there was no right or demand under that common mistake, the presentation was clogged with a condition, obliging him to give up the living; whereas he ought to have it, as all benefices are, by the policy of the law, held by a tenure for life. Both parties, the person presenting and he who was presented, had, I believe, upon the whole, a very honorable purpose; and I see it in no other view than that these conditions should not be operative, if James Dashwood had a right to be presented."

cept a bishopric during incumbency, be against public policy? There are many such bonds.

"Under these circumstances the question naturally arose as to the effect of a bond of resignation, general, or in favour of a particular person; and I do not see how I could possibly interpose to relieve merely on the ground that such bond was given. Whether he understood, or fancied that he had the right, without giving a bond or not, he has given it; and two principles oppose his claim to be relieved against it. If, as the Court of King's Bench held, a bond to resign in favour of a particular person is good, as not being precisely the same as that which in the case of *The Bishop of London* v. *Ffytche*, (1 Bro. C. C. 96. Cunningham's Law of Simony) was held bad in the House of Lords, on that ground, there can be no relief against it: if it falls within the principle on which the bond was in that case determined to be bad, the plaintiff claims relief against an act, with reference to which this court would not stir: not, as in the case of marriage brokage, bad upon grounds of policy, and therefore admitting relief; but bad, as being a corrupt transaction: the party, therefore, not coming with clean hands, entitling him to relief. Upon that question I give no opinion; as, if it is to be decided, the opinion of a court of law must be had upon it; and therefore, there is no reason to grant an injunction against an action on the bond." *Vide ante*, 341.

Lord Eldon holds, that a bad resignation bond is not bad upon grounds of public policy, but bad as being a corrupt transaction.

It seems that equity will not grant relief to the obligor in a bad resignation bond, he being *particeps criminis*.

In *ex parte Rainier*, in *Rowlatt* v. *Rowlatt*, 1 Jac. and Walk. 280, a bond for the performance of a covenant to pay an annuity, until a person should be in the enjoyment of a benefice which he might hold during his life, of the yearly value of 600*l*., was held to be satisfied by his induction to a living of that value, accompanied by a bond to resign in favour of either of two sons of the patron, when qualified to take it: but liberty was given to take the opinion of a court of law. On the

part of the parson it was contended, that, having been presented on an undertaking to resign, and a bond being given to that effect, it was a benefice that could not have been retained for life. But Lord Chancellor Eldon said, "Still he might have held it for life; he might, if he chose, have kept the living, and forfeited the bond. You may, however, if you like, take a case on it to the Court of King's Bench. The House of Lords determined that a general bond to resign at the patron's request is simoniacal; *Bishop of London* v. *Ffytche*; that is the declared law: since that, the Court of King's Bench has taken the distinction, that if it be a bond to resign in favour of a specified person, it is not bad. As to which, I have only to observe, that it would be very difficult to say what is the principle of that decision. The House of Lords went upon the ground of public policy, that it was against the policy of the law, to permit the incumbent to be placed under such a restraint." [*Add*, as was imposed on him by a general resignation bond.] The matter stood over for the plaintiffs to consider whether they would take a case, which they afterwards accepted: but it is understood that they have since declined to persevere in it.

Lord Eldon says, that the house of lords determined the *Bishop of London* v. *Ffytche* upon the ground of public policy.

With due deference to the authority of my Lord Eldon, it seems clear, from the reports, that the House of Lords determined the case of *The Bishop of London* v. *Ffytch*, solely on the ground of the statute 31 Eliz. The bishop pleaded the bond as being "against the form of the statute; See Cunningham, 54, 61, 62; and the principal reason assigned by the plaintiff in error was, that a general bond of resignation is an assurance of profit or benefit to the patron, and therefore contrary to the statute 31 Eliz. c. 6. and inconsistent with the oath of simony. See Cunningham, 59. The questions put to the judges are founded on the act of Eliz. See 3 Burn's Eccles. Law, 357: Cunningham, 68, 70. The answers of the judges shew that they thought, that if the presentation made the bond void, it must be by force of the statute. See Cunningham, p. 79, 84, 86-7, 88, 91, 93, 95, 99, 105, 114, 117, 119, 120, 122. *Ante*, 380, 382, 383, 384, 386, 387, 389, 391, 392, 397, 398, 399. So the Bishops, see 3 Burn's Eccles. Law, 359; Cunningham, 123-4, 125, 127, 142, 143, 147, 150. So Lord Thurlow, see page 161. *Ante*, 405, 406. So Lord Mansfield, see Cunningham, page 169. *Ante*, 407. And see the observations of Mr. Justice Le Blanc, *ante*, 414. If the policy of the Law is solely sufficient, of what utility was it to mention the statute of Elizabeth? These indefinite principles of public policy are dangerous doctrines, for they leave too much discretionary power in the breast of the judge. *Vide ante*, Vol. II. 268; and Mr. Justice Buller's opinion, *ante*, 382; and Lord Mansfield's, *ante*, 410; and see *Rooke's* case, 5 Co. 99, b.; *Cowper* v. *Cowper*, 2 P. Wms. 753; *Burgess* v. *Wheate*, 1 Wm. Bla. 123; 1 Eden, 177, S.C.

For a judge to make what he conceives a principle of public policy, the ground work for overturning established decisions, is an act incompatible with the existence of the legislative principle of the English constitution. The practice must be sacrificed to the constitution, or the constitution must be sacrificed to the practice. For by the constitution of the country, the judges are to expound the laws, not to make them.

If the rules and maxims of law are to ebb and flow with the taste of the judge, or to assume that shape which in his fancy best becomes the times; if the decision of a case is not to be ruled by or depend at all upon former determinations in other cases of a like nature, then it may be asked, when will the country be relieved from constant and distressing perplexity, strife, and litigation?

Indeed, one half of the doubting on the law, which of late has been so freely indulged in, is grounded on these varying principles of public policy. Unfortunately, a general system of doubting on points of law, previously understood, and acted on as being clear, has been, and still continues to be, a baneful obstacle to the professors of the law, and a general stigma on the science.

How much more rational, and better calculated for the great ends of society, is the doctrine recommended by Lord Mansfield in the case of *Dow* and *Laming*, where his Lordship's words, as reported in 1 Burrow, 1106, merit our most serious attention, no less for the justness of the observation, than for the real importance and utility of the advice they contain. "It is to be lamented (said his Lordship) that questions of this kind have occasioned so much litigation and expense. The best way to settle them is to reduce the matter, if possible, to some certain rules." Fearne, 139, 3d ed.

That judge is a public benefactor, who, imitating the example of Lord Bacon, "labours, not to stir conceits and subtle doubts; but to open the law upon doubts, and not to open doubts upon the law." Bac. Us. 3; Tr. 301.

Considering that in *The Bishop of London* v. *Ffytche*, all the judges excepting one were against the decision:—that of the lords, there was only a majority of *one*, and that majority composed chiefly of bishops; *one* of whom (the turbulent Watson,) with syllogistical sophistry, and assumed humility, was bold enough to contend, that the house was not bound of necessity to adhere to the precedents, because the rule *stare decisis* was a maxim not admitted in philosophy, nor acknowledged in divinity; and that the House of Lords, being a court of appeal, was not bound by the precedents of the courts below:—considering that the decision was grounded on equivocating and contradictory assertions, generally false, and rarely verging on truth:—and that the courts have sub-

sequently been generally disposed to adopt any distinction between the *Bishop of London* v. *Ffytche*, and cases of a similar nature, brought before them, as in *Partridge* v. *Whiston*, 4 Durnf. and East, 359, *supra*, 414, and the succeeding cases;—every attempt to extend the principle of the decision in the case of *The Bishop of London* v. *Ffytche*, is not only to be regretted, but ought to be reprobated; inasmuch as it has a tendency towards extending the wretched state of confusion and uncertainty in which the law is at present involved.

Conclusion.

But the main question here is, what is the law concerning bonds of resignation? In the case of *The Bishop of London* v. *Ffytche*, the House of Lords held, that a PRESENTATION after *a general bond of resignation*, is illegal: the principle of which decision was, that the bond was a *benefit* to the patron, within the 31 Eliz. c. 6; that the giving it was the *price* of his presentation; and that it was given for the *purpose* of obtaining the presentation. *Vide ante*, 385, 387, 405, 406, [and 362 n. *]. Therefore, if it be a benefit to the patron within the statute, the bond is necessarily void. *Vide ante*, 368, 382-3, 397, 409. If such a decision can be said to be founded on any principle, then the principle of that decision, if it be taken fully, equally applies to a *special* bond of resignation, if given *before* presentation. But if the authority be only followed as a decision on the particular circumstances, it will not affect particular bonds of resignation. However, if it does not appear on the face of the bond, that it was given *before* the presentation, then the case of *The Bishop of London* v. *Ffytche*, is no authority for holding that either a *general* or a *special* bond of resignation is illegal. This is admitted even by Mr. Baron Eyre. *Vide ante*, 388. That such a *special* bond is legal, the cases of *Bagshaw* v. *Bossley*, 4 Durnf. and East, 78; *Partridge* v. *Whiston*, *ibid.* 359, *ante*, 413, are authorities.

This conclusion is formed independently of the cloudy doubts which have been raised on the point. What effect those doubts may have on future decisions, time only can determine.

Misera servitus est, ubi jus est vagum, aut incognitum. 4 Inst. 246.

It seems that no kind of resignation of a benefice can be enforced either at law or in equity, by any other means than suing for a penalty. *Vide ante*, 373.

1821. A bill to compel a rector to resign in favor of a particular

For a court of equity will not decree a specific performance of a covenant or agreement to resign a living. Thus, in *Newdigate* and another v. *Helps*, 6 Madd. 133, a bill was filed, calling upon the court to compel a rector to resign his living in favour of one of the plaintiffs,

in pursuance of a covenant to that effect, which the rector entered into upon being presented. The patron joined as plaintiff in the suit.

person, in pursuance of a covenant for that purpose, entered into when the rector was presented, will not lie.

The Vice-Chancellor, Sir John Leach, said, "This is a case of the first impression. In matters of real property, or property which partakes of realty, this court exercises its authority to put a purchaser in the actual possession of the subject of his purchase, considering that damages for the nonperformance of the contract, which are all that the law can give, are not always an adequate compensation. It is argued, that the present case is within that principle. The right of presentation to a living is mere matter of property; but the actual possession of a living is not a mere matter of property, but depends upon the discretion of the ordinary. The ordinary has an important duty to exercise, first in the acceptance of a proferred resignation, and next in the acceptance of a new presentee. Over the ordinary this court has no jurisdiction; nor has this court the power to enter into those considerations which may fitly induce the ordinary to refuse the surrender of the defendant, or the presentation of the plaintiff.

"For these reasons the court has no means of securing to the plaintiff the possession of the living, and no means of determining his fitness for that possession. I am of opinion, therefore, that a court of equity ought not in any manner to interfere in the execution of such a contract, and that the parties must be left to seek in a court of law such redress as they may be entitled to.

"I give no opinion whether in this case there be a legal remedy."

It seems that there is no legal remedy; for the case of *Pyke* v. *Pulleyn*, Lutw. 343, the only reported case on a covenant, does not lead to the expectation of damages in a court of law. *Vide ante*, 374-5.

[Since the first edition of this work was published, the great case of *Fletcher* v. *Lord Sondes*, 5 B. & A. 835, 3 Bing. 501, and 1 Bli. N. S. 144, S. C., has been decided in the most solemn manner by the House of Lords, all the judges having been summoned and delivered their opinions. By this case it has been determined that all bonds for the special resignation of livings are void, three of the judges, Best, C. J., Burrough, and Gazelee, J. J., dissenting. All doubt, therefore, is now removed from this matter; but the subject is so interesting, not only as relating to the points discussed, but as to its general bearing upon the whole jurisprudence of this country, that the note has not been abridged. No person can read the preceding pages without interest mixed with alarm, when he reflects that in the space of fifty years, an entire revolution has taken place in the law on this subject; and that a doctrine supported by the accumulated decisions of two centuries, considered and acted upon as a fixed principle of our laws, was questioned, and immediately, although partially, reversed; and that

now, without any legislative enactment, we are at complete variance with every opinion formerly entertained on the subject.

On the decision of *Fletcher* v. *Lord Sondes*, a very natural anxiety arose in the minds of those who had innocently acted under the former opinions as to bonds of special resignation. A bill was accordingly brought in by the Archbishop of Canterbury for the relief of such persons. It received the royal assent on the 14th June, 1827. 7 & 8 Geo. IV. c. 25. enacts, "That no presentation of any such spiritual office to or upon any spiritual person, before the ninth day of *April* in the present year of our Lord one thousand eight hundred and twenty-seven, nor any admission, institution, investiture, or induction thereupon, shall be void, for or by reason of any engagement entered into by such spiritual person, or any other person or persons, to or with the patron or patrons of such spiritual office, or to or with any other person or persons, for the resignation of the same, that some person specially named or described therein, or one of two persons so specially named or described, should be presented, collated, or nominated to such spiritual office, or that the same should be given or bestowed to or upon him, or for the resignation thereof upon notice or request, or otherwise, when a person, or one of two persons, so specially named or described, should become qualified, by age or otherwise, to accept and take the same; and that it shall not be lawful for the King's most excellent majesty, his heirs or successors, for or by reason of such engagement as aforesaid, to present or collate unto, or give or bestow such spiritual office; and that such spiritual person, and patron or patrons, or other person or persons respectively, shall not be liable to any pains, penalty, forfeiture, loss, or disability, nor to any prosecution or other proceeding, civil, criminal, or penal, in any court ecclesiastical or temporal, for or by reason of his, her, or their having made, given, or entered into, or accepted or taken, such engagement as aforesaid; and that every such presentation or collation, or gift or bestowing, before the said ninth day of *April* in the present year of our Lord one thousand eight hundred and twenty-seven, and every admission, institution, investiture, and induction thereupon, shall be as valid and effectual in the law, to all intents and purposes whatsoever, as if such engagement had not been made or taken; any thing in any act, statute, or canon, or any law to the contrary in anywise notwithstanding.

7 & 8 Geo. 4, c. 25. No presentation to any spiritual office, made before 9th April 1827, shall be void on account of any agreement to resign when another person, specially named, shall become qualified to take the same.

Persons making any such agreement, not subject to any penalty on account thereof.

"II. And be it further enacted, That every such engagement which hath been made, given, or entered into at any time before the said ninth day of *April* in the present year of our Lord one thousand eight hundred and twenty-seven, for the resignation of any benefice with cure of souls, dignity, prebend, or living ecclesiastical, to the intent or purpose, manifested by the terms of such engagement, that some person specially named or described therein, or one of two persons so specially

All such engagements entered into before 9th April 1827, valid and effectual in law.

named or described, should be presented, collated, or nominated to such spiritual office, or that the same should be given or bestowed to or upon him, or for the resignation thereof upon notice or request or otherwise, when a person, or one of two persons, so specially named or described, should become qualified, by age or otherwise, to accept and take the same, shall be good, valid, and effectual in the law to all intents and purposes whatsoever; any thing in any act, statute, or canon, or any law to the contrary in anywise notwithstanding.

Engagements not *bonâ fide* made with such intent.

"III. Provided always, That nothing in this act contained shall extend or be construed to extend to the case of any engagement which shall not have been made, given, or entered into really and *bonâ fide* to the intent or purpose aforesaid, and no other: Provided also, that nothing herein contained shall be deemed compulsory upon the ordinary to accept the resignation.

If the person so specially named be not presented to such spiritual office within six months, the resignation shall be void.

"IV. Provided always, and be it further enacted, That in every case where any such spiritual office shall after the passing of this act be resigned pursuant to any such engagement, and the person, or one of the two persons, so specially named or described therein shall not be presented, collated, nominated, or appointed by donation to such spiritual office within six calendar months next after such resignation, the resignation which shall so have been made pursuant to such engagement shall to all intents and purposes be void and of no effect; and the spiritual person who shall so have resigned shall, without any act or form, and as if such resignation had not been made, be deemed and taken to all intents and purposes to be and to have continued the incumbent actually in possession of such spiritual office, notwithstanding such resignation, and although within the said six months any other person may have been presented, collated, nominated, instituted, or inducted thereto, or received investiture thereof, provided such person so resigning shall not by reason of any other act or thing have become disqualified to hold the same.

Proviso for proceedings already commenced.

"V. Provided also, and be it further enacted, That nothing in this act contained shall extend or be construed to extend to the case of any such engagement, upon or with respect to which any action, suit, bill, plaint, or information shall have been brought, sued out, or commenced and prosecuted before the ninth day of *April* in this present year."

Since the decision of *Fletcher* v. *Lord Sondes*, it has been held, that as the resignation bond was void, the presentation, induction, and institution of the clerk who executed it, are also void under the 31 Eliz. c. 6. *Doe* dem. *Watson* v. *Fletcher*, 8 B. & C. 25. *Ed.*]

See further, on bonds of resignation, Watson's Clergyman's Law, 36-7, 4th ed. Gibson's *Codex Juris Ecclesiastici Anglicani*, 799, 809, 2d ed. Degge's Parson's Counsellor, 51, 6th ed. 3 Burn's Eccles. Law, 354, 6th ed. 6 Bac. Abr. 192, *Simony*, (B), &c. 1 *Ibid.* 644. *Conditions*, (K); 1 Fonbl. Treat. of Equity, 232; Com. Dig. *Esglise* (N. 3.) *ad finem.*

TO RESIGN ON REQUEST.

BOND *not to vacate a Rectory without the Patron's Consent, and to resign the Living on Request, and procure the Bishop to accept the Resignation: being a* GENERAL (*a*) BOND OF RESIGNATION.

Obligation, one to one.

BOND from [*parson*] of, &c. to [*patron*] of, &c. in [*double the value of the living for the parson's life*] pounds, *ut ante*, 179.

Recital of vacancy of living;

and parson's presentation thereto.

WHEREAS the rectory of the church of , within the diocese of , is now vacant by the death (*or* resignation) of [*last rector*], clerk, the last incumbent there; and the said [*patron*], being the undoubted patron of the said rectory and church, hath by writing under his hand and seal, bearing date the day of 18 , presented the above bound [*parson*] to the bishop of the said diocese, to the end that the said [*parson*] may be admitted, instituted, and inducted into the said rectory and church of .

Condition to resign on request at any time;

not to vacate rectory without patron's consent;

THE CONDITION of the above written obligation is such, that in case the said [*parson*] should be admitted, instituted, and inducted into the rectory and parish church of aforesaid, upon the presentation of the said [*patron*], then if he the said [*parson*] should not at any time or times hereafter, without the consent of the said [*patron*], his heirs or assigns, in writing, for that purpose

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(*a*) The reader must bear in his mind, that subsequently to the case of *The Bishop of London* v. *Ffytche*, the prevailing opinion of the profession has been, that no *general* bond of resignation could be supported. *Vide ante*, 362; *sed vide ante*, 430.

[This bond is clearly void, but as it is short, and may not be wholly uninstructive, it is allowed to remain. *Ed.*]

first had and obtained, accept or take any other preferment in the church, or place, or employment whatsoever in exchange for or in lieu of the said rectory of , or by which the said rectory may be vacated (*b*); or do or commit, or suffer any act, matter, or thing whatsoever, whereby or by means whereof he the said [*parson*] may be deprived of the said rectory, or the same may become vacant. AND ALSO if he the said [*parson*] should at any time thereafter, upon the request of the said [*patron*], his heirs or assigns, absolutely resign the said rectory or parish church of aforesaid into the hands of the bishop of (London) for the time being; and should give notice of such resignation to the said [*patron*], his heirs, or assigns; and also should procure such resignation to be

TO RESIGN ON REQUEST.

(*b*) In the argument of *Dashwood* v. *Peyton*, 18 Ves. 33, *ante*, 423, it was urged by counsel in support of the injunction, "that there was an objection to the bond, as it included a farther obligation not to accept a bishopric; in effect, an undertaking to pay a sum of money, when the obligor shall be promoted to a see: an attempt, by thus defeating the king's right to appoint to the benefice, vacated by that promotion, to impose restraint upon the exercise of that branch of the prerogative, by which his majesty controls the appointment to that important trust; involving duties, the proper discharge of which is of the most essential importance to the public. Upon these grounds a court of equity will not permit this bond to have effect; if it could be enforced at law, and upon such subjects, though there might be a defence at law, there is a concurrent jurisdiction. *Harrington* v. *Du Chatel*, 1 Bro. C. C. 124." Lord Eldon's observations on that point amounted to nothing. *Vide ante*, 426. However, there seems to be no solid objection to such a provision in a bond. For as the crown had not anciently the prerogative of presenting to a benefice vacant by the parson being made a bishop, it being an usurpation of the crown; *ante*, Vol. I. 179; and as the church is the patron's church, it is reasonable that he should invariably have the presentation of a parson thereto, if he can secure it by a special contract. The manners, doctrine, religion, and conversation of the parson, are of the greatest importance to the patron, and ought to be such as he approves; for under the parson, the patron and his tenants and servants are to live; and their conduct is influenced by his example and instructions.

It seems there is no objection to a bond of resignation on the ground that parson is bound not to accept a bishopric.

TO RESIGN ON REQUEST.

and procure such resignation to be accepted.

accepted (*c*), so that the said rectory and parish church may hereby become vacant, and the said [*patron*], his heirs or assigns, be at liberty to present anew thereto; *Then* the above written obligation shall be void; but if default should happen to be made in the performance of all or of any of the matters aforesaid, the same obligation shall be and remain in full force and virtue.

A parson bound to resign a living, must procure the bishop's acceptance of the resignation, or pay the penalty of the bond: but whether the bishop may refuse to accept the resignation without assigning a sufficient cause, appears to be doubtful.

(*c*) In the case of *Hesketh* v. *Gray*, 3 Burn's Eccles. Law, 322, 6th ed. *Resignation*, 5; *ante*, 374, it was held, that the ordinary is a judicial officer, and is intrusted with a judicial power to accept or refuse resignation, as he thinks proper. But that a parson, bound in a bond to resign a living, must procure the bishop's acceptance of the resignation. *Ante*, 372, 374, 382. In the *Bishop of London* v. *Ffytche*, Mr. Justice Willes said, "suppose the bishop was not compellable to accept the resignation, (which he by no means admitted), the bond was good, according to the doctrine laid down by the court in *Hesketh* and *Gray*, and the obligor is bound to see it performed." Cunningham, 107. And Mr. Justice Gould said, "that he agreed with the determination of *Hesketh* and *Gray*, *ante*, 374; whether you can get the bishop to accept the resignation or not, you have undertaken to do it. The law says, you must make a complete resignation. It is not complete unless the bishop will accept it: if he does not prevail upon him to accept it, then he has forfeited the bond." Cunningham, 115; Ambl. 268.

It seems to be clear that the bishop may refuse to accept a resignation, upon a sufficient cause for his refusal; but whether he can merely at his will and pleasure refuse to accept a resignation without any cause, and who shall finally judge of the sufficiency of the cause, and by what mode he may be compelled to accept, are questions involved in doubts. See 1 Bla. Com. 393, (39) Christian's edit. 3 Burn's Eccles. Law, 322, 6th. ed. *Newdigate* v. *Helps*, 6 Madd. 133; *ante*, 431. [This question, as far as it relates to bonds of resignation, is now useless, as such bonds are void. See the preceding notes.]

BOND *from the Purchaser of an Advowson to secure the Incumbency to the Vendor, the present Incumbent, for his Life* (*a*).

TO SECURE INCUMBENCY TO INCUMBENT FOR HIS LIFE.

BOND from [*purchaser*] of, &c. esquire, to [*vendor*] of, &c. clerk, in pounds, *ut ante*, 179.

Obligation, one to one.

WHEREAS the above named [*parson*], being seised or well entitled in fee simple of or to the perpetual advowson, right of patronage and presentation of and to the rectory of the parish church of in the county of , now being full by his own incumbency, lately contracted and agreed with the above bounden [*purchaser*] for the absolute sale thereof to him in fee simple, at or for the price or sum of pounds; *subject* to the incumbency of the said [*parson*] thereon, during his life: which incumbency it was agreed should be renewed for that purpose, in manner hereinafter mentioned. AND WHEREAS in pursuance of the said recited agreement, by an indenture bearing date the day next before the day of the date of the above written bond, and made, or expressed to be made, between the said [*parson*], of the one part, and the said [*purchaser*], of the other part; in consideration of the sum of pounds to the said [*parson*], paid by the said [*purchaser*] *he* the said [*parson*], hath granted, bargained, sold, and confirmed unto the said [*purchaser*], his heirs and assigns, *All that* the advowson, right of patronage, presentation, and free disposition of, in, and to the rectory of the parish church of , in the said county of ; with all the rights, members, and appurtenan-

Recital of contract for sale of advowson in fee, subject to the incumbency of the vendor.

Recital of conveyance of advowson to purchaser.

(*a*) *Vide Newman* v. *Newman*, 4 Maule and Selw. 66, *ante*, 422. [The doubt in this case, as to the invalidity of special bonds of resignation, is removed by the case of *Fletcher* v. *Lord Sondes*, 3 Bing. 501, *ante*, 431. *Ed.*]

TO SECURE INCUMBENCY TO INCUMBENT FOR HIS LIFE.

ces thereunto belonging: *And also* all and all manner of tithes of what nature or kind soever, yearly growing, arising, or renewing in the parish of aforesaid; and which then, or then late were in the tenure of [*tenant*], his assigns or undertenants, at the yearly rent of pounds. *To hold* the same, *unto and To the use* of the said [*purchaser*], his heirs and assigns for ever. AND WHEREAS, in order to carry into execution such part of the said recited contract as concerns the securing the incumbency of and in the rectory of the parish church of aforesaid to the said [*parson*], for and during the term of his natural life, it was agreed by and between the said contracting parties, that the said [*purchaser*] should execute the above written bond, with such a condition thereunder written as hereinafter is contained.

That in order to carry into execution contract respecting the incumbency, it was agreed that purchaser should execute the bond.

NOW THEREFORE THE CONDITION of the above written obligation is such, *That* if the said [*parson*] shall remain and continue the incumbent of the rectory of the parish church of aforesaid, during his life; OR else, if the said incumbency shall become void, by the resignation, cession, deprivation, or other avoidance of him the said [*parson*], or by his accepting any other ecclesiastical benefice; *Then* if the said [*purchaser*], his heirs or assigns, do and shall again present, nominate, and appoint the said [*parson*] to the said rectory of the parish church of aforesaid; and so from time to time, as often as such resignation, cession, deprivation, acceptance, or other avoidance shall happen during the life of the said [*parson*]; *The* above written bond or obligation shall be void and of no effect, or else to remain in full force and virtue.

Condition that if vendor should continue incumbent during his life; or if incumbency should become void;

if purchaser should again present vendor;

and so *toties quoties*.

NOT TO CARRY ON BUSINESS.

BOND *not to carry on Business within Half a Mile* (*a*) *for a certain Number of Years, nor to solicit Custom of Persons mentioned in a Schedule, under the Pain of paying Liquidated Damages.*

Obligation, one to one.

BOND from [*obligor*] of, &c. to [*obligee*] of, &c. in pounds, *ut ante*, 179.

Recital of co-partnership;

WHEREAS the above bounden [*obligor*] and the above named [*obligee*] have lately carried on the business of

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(*a*) A bond, &c. not to use a trade any where in England, is void; but a bond, &c. not to use a trade at a particular place, or with particular customers, is good. *Vide ante*, Vol. I. 172, (*d*); *ante*, 289 (*a*).

Undertaking upon the sale of the good will of a trade, not to carry on the same business, and to use the best endeavours to assist the purchaser, &c. The remedy for a breach is an action or issue, *quantum damnificatus*; and an injunction against proceeding under a judgment for the consideration upon affidavits before answer, was refused.

Where upon the plaintiff's purchasing the good will of the defendant's business for 2,000*l.* the plaintiff proposed that the defendant and his wife should covenant not to embark in the same line of business for ten years to come, or get any one else to do so; and to exert themselves in favour of the plaintiff; but such covenant being objected to by the defendant and his wife as unnecessary, and as an impeachment of their honour, the plaintiff relinquished it, upon the mere undertaking of the defendant and his wife. However, soon after the plaintiff filed his bill for an injunction against proceeding under a judgment for the consideration, upon affidavits, stating, in addition to the above facts, that, contrary to such undertaking, they were encouraging another person to set up in the same neighbourhood, and inducing the plaintiff's customers to leave him. Lord Eldon said, he did not see his way to grant an injunction in this case; observing, that if it had been nothing more than a purchase of the good-will of the trade in question, the vendor would be at liberty to set up the same trade in any other situation; against which, he added, the purchaser had the choice of several securities: he might, he said, take a covenant: which, howe-

dissolution ; , in copartnership, at aforesaid. And WHEREAS the said [*obligor*] and [*obligee*] have dissolved and put an end to the said copartnership ; *And* the said [*obligor*], in consideration of the sum of pounds paid to him by the said [*obligee*], hath assigned to the said [*obligee*], *All* his the said [*obligor's*] share and interest in the stock in trade and effects of the said copartnership : *And* in consideration of the further sum of pounds paid by the said [*obligee*] to the said [*obligor*], at or before the sealing and delivery of the above written bond or obligation, (the receipt whereof the said [*obligor*] doth hereby acknowledge), the said [*obligor*] hath agreed that he will not, either alone or in copartnership with any person whomsoever, carry on the said business of a

assignment from retiring to continuing partner, of all his share ;

and agreement by retiring partner not to carry on business within half a mile ;

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ver, was a very imperfect remedy, as it would give nothing more than an action for damages ; or the parties might fix what should be the damages ; putting them in the shape, not of a penalty, but of liquidated damages ; in which case the remedy would be perfect. Considering the covenant proposed by the plaintiff as having been kept out by bad faith, yet, he said, if he enjoined before answer, or any default of appearance, he must give the same effect to the agreement as he should give at the hearing, if the covenant had been contained in it upon the ground of fraud ; adding, the damage occasioned to the plaintiff was to be compensated on an action against the defendant for the alleged breaches of faith. He, therefore, did not see that any thing could be done, except by an issue, *quantum damnificatus*. When the answer came in, he said, the plaintiff might move again. *Shackle* v. *Baker*, 14 Ves. 468.

The only perfect remedy is liquidated damages.

Injunction, restraining retired partner carrying on trade, where it was so understood but not expressed by arbitrators, on awarding the sum to be paid by the continuing partner.

On one of two partners retiring from trade, it was left to arbitrators to determine, amongst other things, what was to be paid to the retiring partner for the good will of the trade ; and they, on an understanding that the retiring partner would not set up the trade in the same street, or its vicinity, awarded 500*l.* as the share of the retiring partner for the good will, which was paid ; but no mention was made in the award as to the retiring partner not carrying on the trade in the same street or its vicinity. Afterwards, he having set up the trade in the same street, a decree was made, on parol evidence, of the understanding on which the award was made, enjoining him, on the ground of fraud, from carrying on the same trade in the same street or its vicinity. *Harrison* v. *Gardner*, 2 Madd. Rep. 198.

, within the distance of half a mile of the said house at , during the term of years, to be computed from the day of the date of the above written bond or obligation: *And* that he will not, within the said space of years, solicit the custom, either for himself or any person whomsoever, of any of the persons whose names are mentioned or specified in the said schedule or inventory hereunder written; *And* that in case he shall either carry on the said trade or business within the distance of half a mile of the said house in at any time during the said period of seven years; or at any time

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nor solicit custom of persons mentioned in schedule;

and that in case he should, to pay liquidated damages (*b*).

(*d*) DIFFERENCE BETWEEN PENALTIES AND LIQUIDATED DAMAGES. In actions brought for the breach of covenants and agreements, there has sometimes been a difficulty in distinguishing between penalties and liquidated damages. The fair result of the cases seems to be this—

Difference between *penalties and liquidated damages.*

1. Where a sum of money, whether in the name of a *penalty* or otherwise, is introduced in a covenant or agreement, merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed or contract, and the penalty only as accessory, and therefore only to secure the damage really incurred. This rule has long been established in courts of equity, and the statute 8 and 9 W. III. has introduced this practice, and affords the same benefit to defendants at common law; for it is no longer now matter of election in the plaintiff to proceed under this statute: the provisions are compulsory, and must be pursued.

2. Where a deed contains covenants, or an agreement contains provisions, for the performance of several things, and then a large sum is stated at the end, to be paid upon the breach of performance, that must be considered as a penalty.

3. Where the payment of a smaller sum is secured by a larger.

4. Where the word penalty is specifically used, it is merely as a security.

5. A court of equity will relieve against a penalty upon a compensation; and a court of law will not enforce it beyond the actual damage sustained; but where there is a covenant in a deed to pay a particular liquidated sum, neither a court of equity nor a court of law can make a new covenant for a man; nor is there any room for compensation or relief; as in leases, containing covenants for ploughing up a

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within the same period shall solicit the custom of any of the persons mentioned in the said schedule, that then, and in either of the said cases, he the said [*obligor*] shall and will forthwith repay the said sum of pounds to the said [*obligee*], his executors, administrators, or assigns.

Condition that obligor shall not carry on business within half a mile;

NOW THE CONDITION of the above written bond or obligation is such, *That* if the said [*obligor*] shall and do, either alone or in copartnership with any person or persons whomsoever, carry on the said trade or business of , or dealer in , or any of them, within

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meadow. If the covenant be "not to plough," and there be a penalty, a court of equity will relieve against the penalty, and direct an issue of *quantum damnificatus*. And in an action of covenant at common law, a breach must be assigned, and the extent of the injury will be the measure of damages which the plaintiff will recover. But if it be worded to pay 5*l*. an acre for every acre ploughed up, there is no alternative; no room for any thing against it; no compensation; it is the substance of the agreement. *Lowe* v. *Peers*, 4 Burr. 2229. [*Farrant* v. *Olmins*, 3 B. and A. 692, *acc.*]

6. Where the precise sum, therefore, is not of the essence of the agreement, the *quantum* of damages may be assessed by a jury; but where the precise sum has been fixed and agreed upon by the parties, that very sum is the ascertained and liquidated damage; the jury are confined to it, and the plaintiff cannot recover beyond it. For example, where a stipulated sum has been claimed for breach of a marriage contract, in which case it might not be possible to ascertain precisely what damages the person in respect to whom the contract is broken has sustained; and therefore the contracting parties agree to pay a stipulated sum: in such case the sum stipulated is, by the convention of the parties, the *real* debt, and becomes due, *in integro*, on a breach of the contract.

7. But in all articles containing *penalties* there are two remedies, either of which may be pursued, at the option of the party injured: for, as often as the articles are broken, he may have *toties quoties*, an equitable relief, upon the articles themselves, for a partial breach of contract; or he may take the penalty. That is to say, where the penalty is contained in any other instrument than a bond, damages may be recovered against it; *Winter* v. *Trimmer*, 1 Wm. Bla. 395; *Harrison* v. *Wright*, 13 East, 342; for the plaintiff has his option to sue either for the penalty, or for the breach of contract.

the distance of half a mile in any direction of the said house at , at any time within the space of seven years, to be computed from the day of the date of the above written bond or obligation; OR if the said [*obligor*], either by himself or by any other person whomsoever, shall at any time within the said space of seven years solicit the custom of any of the persons whose names are specified in the schedule or inventory hereunder written, to deal either with himself, the said [*obligor*], or with any other person whomsoever in the said trade or business of , or any of them; OR induce or prevail upon, or attempt to

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nor solicit custom of any of the persons mentioned in the schedule;

or attempt to induce any of

If he sue for the penalty in an action of *debt*, the case is within the statute 8 and 9 W. III. (as to which statute, *vide post*, 460;) and if the penalty be paid, according to the stipulation of the articles, or be recovered as the debt in law, the party cannot resort back to his covenant or action for the breach of the contract; nor would he, it seems, have remedy in equity. *Ante*, Vol. II. 627. But if he sue either in covenant or *assumpsit*, according as the writing which contains the penalty is under seal or not, he proceeds for damages: and it is immaterial whether he claims the penalty or not, for the jury are not bound to give that sum, but may give more or less, as they think fit; and the case is not within the statute, for in these actions, which sound in damages, the judgment is for the damages found by the jury, and no more, and cannot possibly stand as a security for future breaches. The statute is evidently confined to actions of *debt*. Even in *debt*, whenever the sum mentioned in any instrument must, from the express language of the instrument, or from necessary implication, be considered as the ascertained or liquidated damages agreed to be paid by one party to the other on the happening of a particular event, or the performance or omission of a particular act, the statute will not apply; for in such case the sum is not a penal sum; and courts of equity will not relieve against such sum, although they will against a penalty. *Ante*, Vol. I. 47, (*h*).

Ponsonby v. *Adam*, 6 Bro. Parl. Cas. 418; *Goddard* v. *Vanderheyden*, 3 Wils. 270; *Harrison* v. *Wright*, 13 East, 343; *Rolfe* v. *Peterson*, 6 Bro. Parl. Cas. 470; *Sloman* v. *Walter*, 1 Bro. C. C. 418; *Hardy* v. *Martin*, *ibid.* 419; *Errington* v. *Aynesly*, 2 Bro. C. C. 341; *Shackle* v. *Baker*, 14 Ves. 468; *ante*, 439; *Lowe* v. *Peers*, 4 Burr. 2229; *Cotterel* v. *Hook*, Doug. 101; *Bird* v. *Randall*, 1 Wm. Black. 387, and 373; *Winter* v. *Trimmer*, *ibid.* 395; *Fletcher* v. *Dyche*, 2 Durnf. & East, 32; *Astley* v. *Weldon*, 2 Bos. & Pull. 346; *Smith* v.

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the same persons not to deal with obligee;

induce or prevail upon any of the said persons whose names are mentioned in the said schedule, not to deal, or discontinue his, her, or their dealing with the said [*obligee*]; *Then*, and either of the said cases, if the said [*obligor*], his heirs, executors, or administrators, shall and do forthwith well and truly pay or cause to be paid unto the said [*obligee*], his executors, administrators, or assigns, the full sum of pounds of lawful money of Great Britain [and Ireland], without making any deduction or abatement thereout whatsoever; the said bond

under pain of paying liquidated damages.

Dickenson, 3 Bos. & Pull. 630; *Wilbeam* v. *Ashton*, 1 Camp. 78; [1 Fonbl. Eq. 152, and the cases referred to.]

Where the sum is considered as liquidated damages, and an action of covenant or *assumpsit* is brought to recover it, it seems that the jury are bound by the agreement of the parties to give that sum.

Where a person binds himself in an agreement to pay a certain sum of money in case of a breach of the terms of it on his part, and it is therein stated, "that the sum mentioned is to be considered as liquidated damages," *Semble*, that in an action of covenant or *assumpsit* upon the agreement, the jury are bound to give the plaintiff the whole money; and that such sum is not to be considered as a penalty, but as damages ascertained between the parties.

Thus in *Barton* v. *Glover*, 1 Holt's *Nisi Prius* Cases, 43, in an action of *assumpsit*, the facts were as follows: the plaintiff and defendant were coach proprietors at Croydon. On the 2d of April, 1815, they entered into an agreement, the substance of which was, that in consideration that Barton would pay to the defendant the sum of 175*l.*; 50*l.* to be paid in money, and the residue in bills of a month from the date of the agreement, the defendant would withdraw his stage coach from the road, and not engage or concern himself in driving any other stage coach on the road from Croydon to London. The following was the clause in the agreement on which the question arose:—

"And for the due and punctual performance of this agreement, each of the said parties to these presents does hereby agree to bind himself to the other of them in the sum of 500*l.*, to be considered and taken as liquidated damages, or sum of money forfeited or due from the one party to the other, who shall neglect or refuse to perform his part of the agreement."

The counsel for the plaintiff insisted, that he had a right to a verdict for the whole penalty in case he should shew a breach of the agreement. *Fletcher* v. *Dyche*, 2 Durnf. & East, 32.

The defendant's counsel, *contra*.—The 500*l.* is merely intended as a penalty. It is not because the parties use the term liquidated damages, that for every breach of the agreement, however slight, the whole penalty can be exacted. Penalties can seldom be enforced conscientiously; courts of law lean against them, and courts of equity relieve against them. He cited *Astley* v. *Weldon*, 2 Bos. and Pull. 346.

Lord Chief Justice Gibbs said, "There are a great many cases in

or obligation shall be void and of no effect; otherwise shall be and remain in full force and virtue. NOT TO CARRY ON BUSINESS.

THE SCHEDULE to which the above written condition refers. Schedule.

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which stipulated damages are contracted for, but in which neither courts of law nor equity will permit the parties to recover them. Neither of the cases cited comes up to the present. In *Astley* v. *Weldon*, there was no stipulation that the damages should be liquidated; and in that case there were several minor fines, which repudiated the idea that the whole penalty should be due for every breach. But in the present case, unless the damages are to be considered as liquidated, and definitively ascertained by the parties themselves, the clause in the agreement means nothing."

His Lordship said he would reserve the point; but the cause was afterwards referred.

In *Smith* v. *Dickenson*, 3 Bos. and Pul. 630, the Court of Common Pleas expressed themselves clearly of opinion, that the word "penalty," used in the agreement, effectually prevented them from considering the sum mentioned as liquidated damages. Holt's *Nisi Prius* Cases, 45, n. Patteson and Williams's n. 1 Saund. 58, *a*, [*c*]. The word "penalty" excludes liquidated damages.

[A very sensible rule of construction of agreements of this nature, has lately been laid down by Lord Tenterden at *nisi prius*, that the mere words "stipulated damages," or "penalty," shall not be closely regarded, but that the effect of the whole instrument shall be attended to, and that if it will admit it, the real damage sustained shall be alone recovered. *Randal* v. *Everest*, 1 Moo. and Mal. N. P. C. 41. And, although it is said in *Reilly* v. *Jones*, 1 Bing. 302. 8 Moore, 244, S. C. that "no case had been adduced in which, after the parties had themselves employed the expression, *liquidated damages*, the court had holden, the plaintiff could not recover, on breach of the agreement, the sum named as *stipulated damages*;" yet it was distinctly held, "that all the decisions concurred in treating the question as one of *intention*; and that in such cases great inconvenience would arise *from non-compliance with the intention on either side*." See also *Pinkerton* v. *Caslon*, 2 B. & A. 704, and *Clarke* v. *King*, 1 Ry. and Moo. N. P. C. 394. *Davies* v. *Penton*, 6 B. & C. 216. *Ed.*]

BY PRINCIPALS AND SURETIES TO BANKERS, FOR LIMITED AMOUNT.

BOND *from Two Principals and their Two Sureties to Four Bankers* (*a*), *for securing Sums advanced and to be advanced for the Principals, by the Firm of the Banking House for the time being, with Interest and Commission: and with a Proviso, limiting* (*b*) *the Amount of the Money to be recoverable under the Bond.*

Obligation, four to four.

BOND from [*two principals*] of, &c., and [*two sureties*] of, &c., to [*four bankers* (*c*)] of, &c. bankers and copartners, carrying on business under the firm of " and company," in the penalty of 1990*l.*, *ut ante*, 181.

Recital that bankers have

WHEREAS the above named [*four bankers*] have, at the special instance and request of the above bounden [*two*

(*a*) The above form should have been inserted, *ante*, 232.

On bonds for securing a balance on account current, as connected with the stamp act; and whether under the stamp act the penalty be the limited sum recoverable under a bond.

(*b*) ON BONDS FOR SECURING A BALANCE ON ACCOUNT CURRENT, AS CONNECTED WITH THE STAMP ACT: AND WHETHER UNDER THE STAMP ACT THE PENALTY BE THE LIMITED SUM RECOVERABLE UNDER A BOND.

The reason for limiting the sum to be ultimately recoverable on the bond, is in order to bring it unquestionably within the specific stamp duty, for a limited sum.

In this place it may be desirable attentively to consider the stamp

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(*c*) The obligees, and the survivors and survivor of them, and his executors or administrators, will be trustees for future partners until the bond is assigned to them.

principals], opened an account with them; and have already paid to and to their use divers sums of money. And it having been agreed, that such account shall be continued, opened an account with principals: and that the firm for the

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act, in relation to the duties imposed on bonds given as a security for monies afterwards to become due.

After enumerating the duty on a bond given as a security for any definite and certain sum of money, not exceeding a given sum, which may be called the first class, the act 55 Geo. III. c. 184, imposes the following additional duties, which for the purpose of distinguishing each, may be called the second and third classes. 1st class.

"Bond given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be;

"Where the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain, and without any limit. - - - - - - - - £25 0 0 2d class.

"And where the money secured, or to be ultimately recoverable thereupon, shall be limited not to exceed a given sum— } *The same duty as on a bond for a limited sum.*" 3d class.

In practice, bonds for payment of a definitive sum with interest, falling under the *first class*, have the definitive sum secured, mentioned in the condition, and the penalty is generally double the amount of the sum secured, in order that the penalty may cover the interest. *Vide ante*, 200. *Post obit* bonds fall under the first class, although the payment be contingent: and so it seems do bonds to resign benefices, &c. *Sed vide post*, 456. 1st class.

If a bond has a penalty, then "the money secured, or to be ultimately recovered thereupon," is neither "uncertain," nor "without any limit;" for, both at law and in equity, the penalty is the debt, and more than the penalty cannot be recovered under the bond. *Ante*, 200; *Brangwin* v. *Perrot*, 2 Wm. Bla. 1190; *White* v. *Sealy*, 1 Dougl. 49; *Wilde* v. *Clarkson*, 6 Durnf. and East, 305. Therefore, it is impossible that a bond can come under the *second class*, unless it be a bond without any express penalty; namely, a single bond generally for all such sums as might be from time to time advanced. (See the form, *post*, 467.) Such a bond, though it would operate as a covenant, was most probably the exact kind of instrument in the contemplation of the 2d class.

time being may, by accepting bills, &c. advance monies for principals:

it may happen that the said [*four bankers*], some or one of them, either alone or jointly with the persons or person who shall or may become partners or partner with them,

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legislature, as it would be truly and unequivocally a bond for securing an indefinite sum of money. 2 Price, 26. However, it is not improbable but that the class termed the second class was inadvertently inserted in the stamp act under the head *Bond*, as well as under the head *Mortgage*, without sufficiently attending to the different natures of the instruments. In a mortgage the value of the estate is the extent to which the security is limited: in a bond with a penalty, the amount of the penalty is the extent to which the security is limited. Probably the clause may be considered as perfectly useless in relation to a bond. For instance, supposing a bond to be taken in the penalty of one hundred million pounds, or any larger sum, conditioned for the payment of all such monies as shall be thereafter lent, advanced, or paid, that is a security "for a definitive and certain sum of money:" the penalty makes it certain, because no greater sum than the penalty is secured, although only a smaller sum may be ultimately recoverable thereupon. Whether the security be a single bond, or a bond in such a large penalty as renders it almost morally certain that the amount of the penalty never can be exceeded, yet the stamp is the same, namely, 25*l.*

3d class.

The *third class* contemplates an express limitation, either by the penalty, or by the condition of the bond. For if the condition be the limitation, and the penalty be larger than the limitation, the penalty is useless: and if there be no limitation by the condition, the only limit can be the penalty.

These conclusions are formed independently of (it seems an ill considered) determination of the Court of Exchequer, in which it was held, that the penalty is not to be considered as limiting the extent of the security, where the bond is given to secure the payment of a final balance on account current. *Scott* v. *Allsopp* and others, executors, &c. 2 Price, 20.

Bond for securing money already advanced, and to be in future advanced, in account current, (although the obligation be under a penalty in

The facts were these; the plaintiff had been nonsuited on the trial of this cause, at the Hereford Summer Assizes, 1815, by the direction of Mr. Baron Wood. It was an action of debt on a bond from the defendant's testator and others, in a penalty of 4,950*l.* The condition (reciting that the obligors, who were bankers, had frequent occasion to borrow money of the plaintiff, and to negotiate bills belonging to or received from him), was, that if they or either of them should pay the

or some or one of them in the banking business; or other the persons or person for the time being constituting the firm of the said banking house, or carrying on the business

BY PRINCIPALS AND SURETIES TO BANKERS, FOR LIMITED AMOUNT.

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plaintiff "all and every such sum or sums of money *as they now stand indebted* to the said J. B. Scott, *or which they shall or may hereafter owe or stand indebted in account current*, to the said J. B. Scott, his executors, administrators, or assigns, Then," &c.

The defendant pleaded the general issue, and *plene administravit præter*, 2,000*l.* Replication joined issue, and prayed judgment as to the said 2,000*l.* Breaches suggested (under the statute) that defendant's testator, at the time of the execution of the bond, was indebted *cum aliis* to the plaintiff in 850*l.* account current; and that, after making the said bond, the testator, in his life time, stood indebted to the plaintiff, in account current, 13,000*l.* Yet, &c.

The objection on which the nonsuit had been directed by the learned judge was, that the bond being ingrossed on a 7*l.* stamp, had not been duly stamped, according to the statute 48 Geo. III. c. 149, schedule part I, and was not therefore a valid security, or capable of sustaining the present action. By that statute there is a provision similar to the above mentioned first and second classes, excepting that the ultimatum of the duty under that act is 20*l.*

After argument on a rule to shew cause why the nonsuit should not be set aside, and a new trial granted, Lord Chief Baron Thompson said, "This point depends entirely on the true construction to be put on this act of parliament, as to the several kinds of bond in the contemplation of the legislature, when it imposed these various duties on bonds of different descriptions; but of whatever description such bonds may be, the duties must be taken to be payable with reference to the time of the execution, without regard to future periods.

"The question before the court is, what sum was payable for the duty on this particular bond at that time? This statute contemplates, in the first place, bonds intended as securities for definite and certain sums; and proceeds, by a scale, to assess the duties payable on those sums being so secured, beginning with the small sum of one pound, and progressively rising to twenty-five pounds; and, as I read the act, it has in view the sums payable by the condition of the bond, without adverting to the amount of the penalty. The next description of bond, and that which is made liable to the largest duty, is that which shall be given to secure the repayment of money advanced, and to be advanced, upon an account current, where the total amount of the money so secured

sum certain, however less than 20,000*l.*), cannot be received in evidence, unless it bear a 20*l.* stamp: being held, notwithstanding the penalty, to be a bond for the security of money which may become due and payable on an account current, together with sums already advanced, where the total amount of the money secured, or to be ultimately recoverable thereupon, is uncertain and without limit, in the words of the 48 Geo. 3. c. 149. Those words are to be construed as applying to the effect of the condition of the bond, without regard to the amount of the penalty, which is not to be considered as limiting the extent of the security, where such bond is given to secure the payment of a final balance on account current.

BY PRINCIPALS AND SURETIES TO BANKERS, FOR LIMITED AMOUNT.

thereof, may, by accepting and paying the bills, drafts, or promissory notes of the said [*two principals*], or by discounting bills of exchange or promissory notes for them;

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thereby, or to be ultimately recoverable thereupon, shall be uncertain and without limit. Then the third class comprehends those wherein it is expressed that the money to be secured thereby, or to be ultimately recoverable thereon, shall be limited not to exceed a given sum; then the same rate of duty is imposed on such bond as if it had been made to secure such given sum: the statute always *applying* to the money intended to be secured by the condition of the bond at the time of its execution.

"On the part of the plaintiff it has been contended, that as no more than the penalty of this bond is at any time recoverable at law, that operates as a limitation of the amount of the security, and makes it a bond securing an indefinite sum, but a sum still within the extent of the penalty. Now I cannot but consider the words in the act, where the money secured, or to be ultimately recoverable, "shall be limited not to exceed a given sum," as *contemplating* an express limitation to be provided by the condition of the bond*.

"Then, inasmuch as the present bond was made to secure the repayment of certain money, already advanced at the time of the execution, as well as all such further sums as should be thereafter advanced by the obligors on an account current, I cannot but consider it to be a bond, whereby the total amount of the money intended to be secured, or to be ultimately recoverable thereon, was, at the time of the execution, uncertain and without limit; and that, therefore, the amount of duty payable thereon at that time was 20*l.*

"In another part of the act, bonds given as security for the transfer of shares in the public funds, (which are generally given in a penalty), are made liable to a duty proportioned to the value of the stock secured to be transferred, which is to be computed according to the average price of such stock at the time of the execution of the bond. There, there is not the least reference to the penalty of such bonds, and

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* *Sed quære, et vide ante*, 447. How does the statute contemplate an exclusive limitation by the condition? It is impossible; for if the security be by single bond, there is no condition. *Vide post*, 467.

or by affording other pecuniary assistance to them from time to time,—advance sums of money for the said [*two principals*]. AND WHEREAS the said [*four bankers*] that bankers have been in-

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the duty which attaches is payable on the money advanced, with reference to the object of the condition of the bond*.

"It seems to me, therefore, that in this case, the penalty is out of the question; and measuring the duty payable at the time of the execution of the bond, by the terms and object of the condition, the bond given in this instance required a 20*l.* stamp, and for want of it, could not be used in support of this action. I think my brother Wood was right in directing a nonsuit, and that it ought to stand."

Mr. Baron Graham said, "The act looks to the general nature of the security, and has no reference to the penalty. Nothing is more frequent than persons, becoming security for others in an uncertain sum, guarding themselves by limiting their engagement to an express amount, and providing (if the instrument be a bond) by the condition, that as soon as so much money shall have been paid, their liability shall cease †. In that case the duty imposed by this act on such

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* The learned Chief Baron's illustration is remarkably unfortunate, because there is not any necessity for referring to the penalty in order to ascertain the duty, for there is another criterion fixed by the legislature, namely, "the value of the stock secured according to the average price thereof on the day of the date of the bond, or on either of the ten days preceding." The value being once ascertained, such a bond is governed by precisely the same principles as a common bond under the first class. In bonds for securing the transfer of stock there is generally a penalty of double the value of the stock, for the intermediate dividends are to be paid by the obligor; and if he do not replace the stock on the day appointed, the obligee may recover the value of the stock either on the day appointed for the transfer, or on the day of trial; *vide ante*, 259; which necessarily may be much more or much less than the value at the date of the bond.

† The learned baron here confounds two different kinds of securities; namely, a bond to secure a running balance to a given amount, as in the above case; and a bond to guaranty advances to a definite amount, as in *Kirby* v. *Duke of Marlborough*, 2 Maule & Selw. 18; *ante*, 241: which case the learned baron clearly had in his mind.

[As to the necessary stamp in such a case, see *Williams* v. *Rawlinson*, 2 Bing. 76; 10 J. B. Moo. 362, S. C.; and *ante*, 241. *Ed.*]

duced to open and continue account, on principals giv-

have been induced to open and continue such account upon the above bounden [*two principals*] entering into the above written obligation, conditioned as hereinafter mentioned:

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bonds, would be measured by the amount of the limitation; but where there is no such limitation so expressed, the sum secured is uncertain and without limit, and the instrument of security is subject to the highest duty. Now, I take this to be exactly such a case, and therefore, that this bond is precisely that which was meant by the act to be made liable to the largest duty. If, as soon as 1000*l.* had become due, the plaintiff had sued on the bond, and had been paid, although he could not have ultimately recovered at law more than the penalty, yet if, on the commencement of each frequent suit, he had, *toties quoties*, received so much, the bond would have, in the end, secured to him a much larger sum than the amount of the penalty; and therefore, I think that this bond should have borne the stamp to be imposed on such as are liable to the highest duty, of 20*l.*"

Baron Graham held, that although the obligee cannot recover at law more than the penalty, yet that, in consequence of the bond, the obligor may voluntarily pay more than the amount of the penalty, and therefore it should have the unlimited duty.

Wood, Baron. "On the best reconsideration that I have been able to give this case, it appears to me, that the duty on these bonds was meant to be measured by the sum intended to be secured by the condition of the bond*. All bonds, whatever may be the penalty, are intended to secure the sum expressed in the condition, and according to the condition; and had the legislature meant to have imposed the duty on the penalty, it would have been, in most cases, imposed on double the sum actually advanced and intended to be secured.

Baron Wood held, that as the obligors may, from time to time, in reduction of the account current, voluntarily pay larger sums than the amount of the penalty, the bond must be considered as a security for a larger amount than the penalty:

(*Having read the words of the act.*) The bond in question was given to secure the balance of an account current after payment, by the principal, of the money advanced at the time of its execution, and of all sums thereafter to be advanced, without limit as to the ultimate or total amount.

I am therefore of opinion, that the condition of this bond, containing no restriction as to the total amount of the money for which it was intended to stand as a security, brings it within the description of bonds made liable by the act to the duty of 20*l.* The money secured by it is uncertain and without limit, notwithstanding the penalty be fixed; for that does not restrain the obligee from recovering ultimately on the condition, as much more than the penalty as the amount of all the sums which may have been in the mean time advanced on the

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* *Vide ante*, 447.

And upon the said [*two sureties*] joining therein as sureties for the said [*two principals*]. ing bond, and sureties joining therein.

NOW THE CONDITION of the above written obli- Condition that if [principals] should not pay

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faith of the bond, and repaid; for the obligors might be called on as often as the money advanced amounted to a sum somewhat less than the penalty, to pay the obligees so much; and thus, in the end, the bond might have availed them as security for 20,000*l.*, or a much greater sum: and it is therefore strictly the kind of bond contemplated by the legislature as being intended to be subjected to the duty of 20*l.*

and upon the same principle he doubted whether on a bond to secure a final balance on account current, the unlimited duty would not be payable, although the condition expressly limits the amount to be recoverable under the bond.

It is said, that if the limitation had been expressed in the condition, that would have taken it out of the class of bonds subject to the largest duty; but I should have doubted whether it would not then have been liable to that duty, if it had been given to secure a *final balance* on account current; but, at all events, in the present case, I am clearly of opinion, that this bond is within the act, and that therefore it could not be received in evidence for want of a proper stamp.

Mr. Baron Richards concurred; suggesting, that otherwise the revenue might be constantly defrauded, by having recourse to the evasion which this sort of bond, if available, would furnish.

Rule discharged.

Practical cautions.

While the above case remains unshaken by any subsequent judicial determination, it would not be prudent in a bond to secure a limited sum, "which may become due upon an account current," to omit an express limitation in the condition of the bond. And, although the act of parliament clearly recognizes a limited security for a final balance on account current, yet, if Mr. Baron Wood's conclusion be correct, there can be no such limited security. Therefore, *ex abundanti cautela*, perhaps it may be prudent, in order to avoid every doubt on this subject, to have a 25*l.* stamp on every bond for securing money which may ultimately become due upon account current.*

That on a bond, no more than the penalty and costs can be recovered, whether by suggesting breaches under the statute 8 and 9 W. III. or otherwise, is clear from the cases cited, *ante*, 200, 447, *et post*, 460, (*a*), where the statute is discussed at some length.

In this place the case of *White* v. *Sealey*, 1 Doug. 49, may be fully Where there is a bond for pay-

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* [The principle of this case, however, seems to have been recognized in *Simson* v. *Cooke*, 1 Bing. 452. *Ed.*]

BY PRINCIPALS AND SURETIES TO BANKERS, FOR LIMITED AMOUNT.

gation is such, that in case [(c) the above bounden [*two principals*], or one of them, their or one of their heirs, executors, or administrators, shall not from time to time, and at all times hereafter (*d*), well and truly pay, or

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ment of rent, &c. the bond is only a security to the amount of the penalty.

stated with advantage. There the defendants had entered into a bond, in the penal sum of 600*l.* conditioned, *inter alia*, for the payment of a yearly rent of 570*l.* by another person. The rent being in arrear, the bond was put in suit, and judgment by default obtained against the defendant. Afterwards, another action was brought on the same bond, and a second judgment entered up. Then a third action was commenced, in bar of which the defendants pleaded the first judgment, and then obtained a rule to shew cause why the second should not be set aside, with costs; and why, upon payment of the penalty and costs of the first action, the plaintiff should not acknowledge satisfaction on the record. They stated, in the affidavit on which the rule was granted, that they had not pleaded the first judgment in bar to the second action, by a mistake they had fallen into, in considering the second declaration when delivered as being the same, and in the same action with the first, and only delivered to cure a mistake in the indorsement on the other. The questions were; 1. Whether the bond, in this case, was a standing security for all the payments of rent during the term, (which was for twenty-one years,) or only to the amount of the penal sum? 2. Whether, upon the equity of the case, and the affidavit on the part of the plaintiff, it did not appear that it was the intention of the parties, that the sureties should be bound for the rent during the whole term, so as to entitle the plaintiff to retain the advantage he had got by the mistake of the defendant?

Mr. Justice Buller at first was strongly of opinion, on the first point, (which had not been made at the bar), that, by the statute 8 and 9 W. III. c. 11. an obligee of such a bond as this might, from time to time, assign breaches, and recover his damages, and have execution for them, though they amounted to more than the penalty in the bond; and that the judgment would still remain as a security for all subsequent breaches.

Mr. Justice Ashhurst said, that would be very equitable as against

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(*c*) Some gentlemen insert the part in brackets, when the principals and sureties join in the same bond; but *quære* the utility of it. This form originated in the case of a surety by a separate bond. *Ut ante*, 237.

(*d*) *Vide post*, 457 (*e*).

cause to be paid unto the said [*four bankers*], some or one of them, either alone or jointly with the persons or person who shall or may become partners or partner with them, or any or either of them, in the banking business; or other

BY PRINCIPALS AND SURETIES TO BANKERS, FOR LIMITED AMOUNT.

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the lessee, but extremely hard on the sureties, who only mean to bind themselves to the extent of the penalty.

Lord Mansfield said, 1. As the bond is conceived, are the defendants liable for more than the whole penalty? I think not, upon the true construction of the statute of William, the meaning of which only was, that a plaintiff should not, upon every breach, be obliged to go into a court of equity to have issues directed of *quantum damnificatus*.

Is there any thing collateral that should make the sureties liable for more? I see nothing in the facts of the transaction which ought to have that effect. The slip in not pleading the first judgment to the second action, only affects the costs of that action, and not the merits.

Mr. Justice Buller then declared himself to be of the same opinion concerning the construction of the statute.

The rule was made absolute, but without costs; some circumstances appearing which satisfied the court that the lessor was misled by the sureties with respect to the smallness of the penalty.

The court will order satisfaction to be entered on the record in an action on a bond of indemnity, on the defendant's paying the penalty of the bond and the costs of the action.

However, in *Lord Lonsdale* v. *Church*, 2 Durnf. and East, 389, *post*, 465, it was held, that in an action on a bond, damages may be recovered for more than the penalty. Mr. Justice Buller said, "I was not satisfied with the determination in the case of *White* v. *Sealy*; I was persuaded that many cases had been determined upon the point, though they did not occur to the Court then; and that case was not moved again, because it was the case of a surety." But in *Wilde* v. *Clarkson*, 6 Durnf. and East, 303, *post*, 465, *Lord Lonsdale* v. *Church*, being relied on to shew that in an action on a bond damages may be recovered beyond the amount of the penalty,—Lord Kenyon, in delivering his judgment, said, "I cannot accede to the doctrine in the case cited by the plaintiff's counsel; according to that, an obligor, who became bound in a penalty of 1000*l*., conditioned to indemnify the obligee, may be called upon to pay 10,000*l*., or any larger sum, however enormous. Suppose the plaintiff proceeds in this action, and no defence is made to it, the judgment would be for the penalty of the bond, and 1*s*. nominal damages for the detention of the debt. But here the defendant is willing to pay the whole penalty and the costs of the action, and the plaintiff is not entitled to more. In actions on bonds, or on any penal sums for performance of covenants, &c. the act of parliament (8 and 9 W. III. c. 11. s. 8.) expressly says, that there shall be judgment for the penalty; and that the judgment shall stand as a security for further

Under 8 and 9 W. III. c. 11, judgment for the whole pe-

BY PRINCIPALS AND SURETIES TO BANKERS, FOR LIMITED AMOUNT.

sums advanced, and to be advanced,

the persons or person for the time being constituting the firm of the said banking house, or carrying on the business thereof, or their or his executors, administrators, or assigns respectively, *All* and every such sums and sum of money as already have been, or hereafter shall or may be paid or advanced; *and* all and every such sums and sum of money, to pay which a liability or engagement has been, or shall or may be entered into or incurred by them the said [*four bankers*], or any or either of them, either alone or jointly with the persons or person who shall or may become partners or partner with them, any or either of them, in the banking business; or other the persons or person for the time being constituting the firm of the said banking house, or carrying on the business thereof, upon or by reason or means of accepting or paying the drafts, bills, or promissory notes of the said [*two principals*]; or by discounting for them other bills of exchange or promissory notes; or by affording to them other pecuniary

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nalty stands as a security for further breaches; but the obligor is not answerable in the whole beyond the amount of the penalty.

breaches: but the obligor is not answerable in the whole beyond the amount of the penalty."

In the case of *White* v. *Sealy*, and in the other cases cited *ante*, 447, the penalty clearly limited the sum which was recoverable under the bond; although the rent for the whole term would have been far beyond the amount of the penalty. So the payments under the bastardy bonds, if duly made, might have exceeded the penalty.

Indeed, it requires consideration, whether bonds of indemnity, bonds for fidelity of clerks and accountants, bonds for the resignation of benefices, &c. ought not to have the duty charged on the penalty. For the bond is given as a security for the payment of a definitive and certain sum of money, although it is uncertain whether any payment, or any payment to the extent of the penalty, will ever become due under the bond. The contingency of the payment cannot, it seems, distinguish those bonds from contingent *post obit* bonds, where the duty is always paid on the sum contingently secured. However, the general practice has been (it is believed) to stamp such bonds as those above enumerated with the 1*l.* 15*s.* duty, as a bond not otherwise charged.

N. B. The last stamp act *expressly* charges a duty of 1*l.* 15*s.* on a bond for indemnifying any person who shall have become bound as surety for the payment of any sum of money or annuity, or for the transfer of any share in any of the stocks or funds.

assistance; *together* with lawful interest for the same monies respectively, from the time or respective times of advancing the same; and also commission, and all other customary charges; *Then* if] the above bounden [*two principals and two sureties*], any or either of them, or their, any or either of their heirs, executors, or administrators, shall and do from time to time, and at all times hereafter (*e*), well and truly pay, or cause to be paid unto the said [*four bankers*], some or one of them, either alone or jointly with the persons or person who shall or may become partners or partner with them, or any or either of them, in the banking business; or other the persons or person for the time being constituting the firm of the said banking house, or carrying on the business thereof, or their or his executors, administrators, or assigns respectively, *All* and every such sums and sum of money as already have been, or hereafter shall or may be paid or advanced; *and* all and every such sums and sum of money, to pay which a liability or engagement has been, or shall or may be entered into, or incurred by them the said [*four bankers*], or any or either of them, either alone, or jointly with the persons or person who shall or may become partners or partner with them, any or either of them, in the banking business; or other the persons or person for the time being constituting the firm of the said banking house, or carrying on the business thereof, upon or by reason or means of accepting or paying the drafts, bills, or promissory notes of the said [*two principals*]; or by discounting for them other bills of exchange or promissory notes; or by affording to them other pecuniary assistance; *together* with lawful interest for the same monies respectively, from the time or respective times of advancing the same; and also commission,

with interest, and commission;

Then if] principals and sureties, or any or either of them should pay

sums advanced and to be advanced,

with interest,

(*e*) The words "*on demand*," are sometimes inserted here; but they should be invariably omitted. For if either of the obligors should become bankrupt before demand, the debt, so far as it is created by this bond, could not be proved under the commission. *Vide ante*, 261, 262, 271. [This is altered by the 6 Geo. IV. c. 16. s. 56. *ante*, p. 263; the words "*on demand*" may therefore be inserted. See *ex parte Dowman*, 2 Gl. & Jam. 241. *Ed.*]

No proof under a bond, unless forfeited before bankruptcy.

and commission: then bond to be void.

and all other customary charges; *Then* the above written obligation to be void, otherwise to be and remain in full force and virtue. PROVIDED, *and it is hereby declared*, that the money to be ultimately recoverable upon this bond shall be, and the same is limited not to exceed the sum of one thousand nine hundred and ninety pounds of lawful money of Great Britain [and Ireland] (*e*).

Proviso, that only a given sum shall be recoverable.

Attestation.

SEALED AND DELIVERED by the above-named [*principals and sureties*], (being first duly stamped,) in the presence of

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(*e*) In some instances a similar addition to the following has been added to a surety bond: but see the observations at the end.

Proviso, that if sureties should pay the sum secured, and more monies should be due to bankers, then all such dividends as they shall receive shall be applied in the first place to pay such further sum.

"PROVIDED ALSO, that in the event of the said [*two sureties*], as such sureties as aforesaid, or either of them, their, or either of their heirs, executors, or administrators, actually paying the said sum of one thousand nine hundred and ninety pounds, or any other sum or sums of money under or by virtue of the above written obligation, and of there being further monies over and above the said sum of one thousand nine hundred and ninety pounds due or owing from the said [*principals*] to the said [*four bankers*], or to any three, two, or one of them, or to them, or any three, two, or one of them jointly with any other persons or person who shall or may become partners or partner with them, or any three, two, or one of them, or to other the persons or person constituting the firm of the said banking house for the time being; then and in such case, all such dividends and monies as shall have been or shall be received by them on the whole monies for the time being owing to them from the said [*principals*], shall be applied in the first place in or towards satisfaction of such further monies so due or owing as aforesaid; *And* the said [*two sureties*], or either of them, their, or either of their heirs, executors, administrators, or assigns, shall not be entitled to receive any such dividend or dividends, or sum or sums of money, or any part thereof, until such further monies shall be fully paid or satisfied."

In a case where the penalty was of the same amount as the sum limited to be recoverable under the bond, and a proviso similar to the preceding was inserted, on a question respecting the validity of the bond as affected by the stamp act, and on a request generally to advise on the bond, the following opinion was given.

"There is apparently great inconsistency in this bond: for it limits the whole amount of monies to be ultimately recovered by virtue thereof to the sum of 1990*l.*; and then states, that in case the sureties should pay the whole sum of 1990*l.*, or any less sum, and there should be a further sum than 1990*l.* due to the obligees, all such dividends as they shall receive shall be applied in the first place to discharge the further sum. Now, if the principal should become bankrupt, *non constat* but that his estate may pay twenty shillings in the pound, and then the money secured by the bond to the obligees would amount to 3980*l.*

"There is a possibility, that the obligees may receive a dividend through the *laches* of the sureties who pay them the money, although the sureties are, under the 49 Geo. III. c. 121, s. 8, entitled to the dividends; *ex-parte Brooke*, 2 Rose, 334; and may even, notwithstanding this proviso, receive them in defiance of the obligees. For the proviso extends only to such dividends as shall be received by the obligees. But, on account of the possibility of receipt of those dividends, (supposing the subsequent proviso would not be held to be void for repugnancy, which I do not think would be the case, for the reasons hereafter mentioned,) I am of opinion, that if the bond has been stamped with the 6*l.* duty, it has not been properly stamped. It should be stamped with the 8*l.* duty.

"I recommend the total omission of the last clause, or that the amount to be secured or recovered should be double the amount of the sum for which the sureties are bound. And that it be provided that the dividends, whether received by the obligees or by the sureties, should be applied towards satisfying any further sum.

"It is observable, that in the above proviso limiting the amount, the word "recovered" only is used, which *prima facie* may not seem to extend to monies received, to which the sureties would be entitled, but which by the proviso the obligees are authorised to *retain*. But I think that is a distinction which cannot be relied on, so far as the bond is a *security*, within the meaning of the stamp act. However, if the bond were properly stamped, I think that no objection on account of the penalty would arise to prevent the obligees *retaining* any dividends they may receive. For I think the proviso extends the security as limited by the penalty, and by the condition."

TO BANKERS FOR LIMITED CURRENT BALANCE.

BOND (*a*) *from a Tradesman and his two Sureties to Bankers, to secure to the Firm of the Banking House for the time being, such Balance as may become due on Account Current* (*b*), *with the Principal, or with him and any Partner or Partners: with a Proviso, limiting the Amount of the Money to be recovered under the Bond; but the Bond to be a Continuing Security to that Amount.*

Obligation three to two, or more.

BOND from [*principal*] of, &c., and [*two sureties*] of, &c., jointly and severally, to [*obligees*] of, &c., in the penal sum of pounds, *ut ante*, 179.

Recital of carrying on business.

WHEREAS the above-named [*obligees*] carry on the business of bankers in copartnership. AND WHEREAS the above bounden [*principal*] now carries on the business of

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(*a*) The above bond was lately settled by one of the learned judges of Westminster Hall, for a friend of his, a banker in the country.

(*b*) Formerly, in an action of debt on bond for performance of covenants, &c. the plaintiff not only had *judgment* to recover the penalty of the bond together with his costs, but was also entitled to take out *execution* for the *whole*, without any regard to the damage which he had actually sustained by the breach of covenant. *Gainsford* v. *Griffith*, 1 Saund. 58, (1). But, "for the relief of his majesty's subjects against causeless and unjust suits, and for the better enabling them to recover their just rights," by statute 8 and 9 W. III. c. 11. s. 8. "In all actions in any court of record upon any bond, or on any penal sum for non-performance of any covenants or agreements contained in any indenture, deed, or writing, the plaintiff may assign as many breaches as

In actions on bonds, or on any penal sum, plaintiff may assign as many breaches as he pleases:

TO BANKERS, FOR LIMITED CURRENT BALANCE.

[ ]. AND WHEREAS the said [*principal*] hath requested the said [*obligees*] to accept and discount notes, drafts, and bills of exchange for him the said [*principal*]; and also to advance and lend him such sum and sums of money as he may require for his convenience and accommodation, in order to enable him to carry on the said business; and also to keep a cash or running account with him the said [*principal*]; which they the said [*obligees*] have agreed to do, upon having the balance of the said cash or running account for the time being, which shall or may at any one time hereafter become due and owing from the said [*principal*], or any person or persons with whom he may hereafter enter into partnership, to them the said [*obligees*], or other the persons or person for the time being carrying

that principal hath requested bankers to advance him monies, and open an account with him:

which bankers have agreed to do, on having the running balance secured by the bond of principal and sureties;

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he shall think fit; and the jury shall assess not only such damages and costs as have heretofore been usually done, but also damages for such of the breaches as the plaintiff, upon the trial of the issues, shall prove to have been broken; and the *like judgment* shall be entered on such verdict as heretofore has been usually done. And if judgment shall be given for the plaintiff on demurrer, or by confession, or *nil dicit*, the plaintiff *may* suggest upon the roll as many breaches as he shall think fit; upon which a writ shall issue to the sheriff of the county where the action is brought, to summon a jury before the justices of assize of that county, to inquire of the truth of those breaches, and to assess the damages; in which writ the said justices of assize shall be commanded to make return thereof to the court from which the same shall issue, at the time mentioned in such writ. And in case the defendant, after such judgment, and before execution, shall pay into court to the use of the plaintiff the damages assessed, and costs, a stay of execution shall be entered upon the record; or if, by reason of an execution, the plaintiff shall be fully paid all the damages and costs, and the charges of the execution, the defendant's body, lands, or goods shall be thereupon forthwith discharged from the execution, which shall likewise be entered upon record; but in each case *the judgment shall* notwithstanding *remain as a further security*, to answer to the plaintiff such damages as he may sustain by any further breach of covenant contained in the same indenture, deed, or writing; upon which the plaintiff may have a *scire facias*, upon the said judgment against the defendant, his heirs, terretenants, or executors or administrators, suggesting other breaches of

and jury may assess damages.

Defendant paying damages, execution may be stayed;

but judgment to remain, to answer any further breach, and plaintiff may have a *scire facias* against the defendant.

TO BANKERS, FOR LIMITED CURRENT BALANCE.

on the said business, now carried on under the firm of , for or by reason or means of any drafts, notes, or bills of exchange to be drawn or discounted upon, with, or by them the said [*obligees*], or such other persons or person as aforesaid; or by reason or means of any monies to be advanced on the said cash account; or by reason or means of any transactions, matter, or thing whatsoever to be had between the said [*principal*] and the said [*obligees*], or such other persons or person as aforesaid, secured to be paid to them the said [*obligees*], their executors, administrators, and assigns, or such persons or person as aforesaid, by the joint and several bond of the said [*principal*], and of the said [*two sureties*], as his sureties, in the penal sum of pounds; *So nevertheless* that no greater

but the extent of the security to be limited.

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the said covenants or agreements, and to summon him or them respectively to shew cause why execution should not be awarded upon the said judgment, upon which there shall be the like proceeding as was in the action of debt upon the said bond, for assessing of damages upon trial of issues joined upon such breaches, or inquiry thereof upon a writ to be awarded in manner aforesaid, and upon payment or satisfaction as aforesaid of such future damages, costs, and charges as aforesaid, all further proceedings on the judgment are again to be stayed, and so *toties quoties*, and the defendant's body, land, or goods shall be discharged out of execution as aforesaid."

To what instruments the statute extends.

This statute was meant to meet the case of non-performance of covenants and agreements secured by bonds or indentures, and which covenants are to be performed at different times, or the monies paid by instalments; and extends as well to bonds with conditions thereunder written for the performance of any thing contained therein, (for the condition of the bond is an agreement in writing,) and the penalties on articles of agreement, or the like, for the non-performance of covenants or agreements contained in the same articles, &c. as to covenants and agreements contained in another indenture, deed, or writing. *Collins* v. *Collins*, 2 Burr. 824, 826.

What bonds are, and what not, within the statute.

A bond conditioned for the payment of an annuity; *Collins* v. *Collins*, 2 Burr. 820; *Roles* v. *Rosewell*, 5 Durnf. and East, 538; *Hardy* v. *Bern*, *ibid.* 540, 636; *Walcot* v. *Goulding*, 8 Durnf. and East, 126; *ante*, Vol. II. 289; or of money by instalments; *Willoughby* v. *Swinton*, 6 East, 550. S. C. 2 Smith, 663; or a bond conditioned to

sum be ultimately recoverable on the said bond; nor the said [*principal*] and [*sureties*], any or either of them, their, any, or either of their heirs, executors, or administrators, be liable to pay more by virtue thereof than the sum of pounds.

TO BANKERS, FOR LIMITED CURRENT BALANCE.

NOW THE CONDITION of the above written bond or obligation is such, that if the above bounden [*principal*] and [*sureties*], or either of them, their, or either of their heirs, executors, or administrators, shall and do, on demand (*c*), well and truly pay, or cause to be paid unto the said [*obligees*], or any of them, or their, or any of their executors or administrators, or other the persons or person for the time being carrying on the business now carried on

Condition for payment of all such sums as shall be due to the firm for the time being,

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perform an award; *Welch* v. *Ireland*, 6 East, 613. S. C. 2 Smith, 666; is within the statute. But the provisions of the statute do not extend to *post obit* bonds: *Wardell* v. *Fermor*, 2 Campb. 285, n. *Cardozo* v. *Hardy*, 2 Moore, 220; [*Murray* v. *Earl of Stair*, 2 Barn. & Cress. 82; and 3 Dow. & Ry. 278. S. C.;] or other bonds conditioned for the payment of money; which are provided for by the statute 4 Ann. c. 16; nor to bail, *Selby* v. *Serres*, 1 Tidd, 604; *Moody* v. *Pheasant*, 2 Bos. & Pull. 446; or replevin bonds; *Middleton* v. *Bryan*, 3 Maule and Selw. 155; nor, as it seems, to bonds given to the Lord Chancellor by the petitioning creditor for a commission of bankrupt, under the statute 5 Geo. II. c. 30, s. 23; *Smith* v. *Broomhead*, 7 Durnf. and East, 304—5; *Smithey* v. *Edmonson*, 3 East, 22: for in the two former cases the court can relieve the defendant without his being compelled to file a bill in equity; and in the latter the Chancellor is expressly empowered to assess the damages by 5 Geo. II. c. 30, s. 23. Neither does it extend to common money bonds, against the penalty of which the courts can give relief by statute 4 Ann. c. 16. s. 13. *Murray* v. *Earl of Stair*, T. 4 Geo. IV. K. B. cited Patteson and Wms's. n. 1 Saund. 58, [*a*]. And where judgment is entered up on a warrant of attorney for securing money by instalments, it is not within the statute, although a bond be also given. *Austerbury* v. *Morgan*, 2 Taunt. 195; *Cox* v. *Rodbard*, 3 Taunt. 74; *Kinnersley* v. *Mussen*, 5 Taunt. 264: *et vide ante*, Vol. II. 289, 290.

It is now held, notwithstanding some cases to the contrary; *Walker* v. *Priestly*, Com. Rep. 376; *Dry* v. *Bond*, Bull. Nis. Pri. 164; *Paul*

The plaintiff must assign breaches under the statute.

(*c*) *Vide ante*, 457, (*e*).

TO BANKERS FOR LIMITED CURRENT BALANCE.

under the firm of , *All* such sum and sums of money which shall or may at any time be due and owing to the said [*obligees*], or any of them, their, or any of their executors or administrators, or other the person or persons for the time being carrying on the business now carried on under the firm of , for or by reason or means of any drafts, notes, or bills of exchange drawn or discounted upon, with, or by them the said [*obligees*], or any of them, or their, or any of their executors or administrators, or such other person or persons as aforesaid, by or for, or on account of the said [*principal*], his executors or administrators; or by, for, or on account of the said [*principal*], and any other person or persons with whom he may enter into partnership, or be concerned in trade with, or for money

on account of principal; or on his, and his partner's account:

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v. *Rogers*, 5 Durnf. and East, 541, n. (b); that the words "*may assign*," in the first part, and "*may suggest*," in the subsequent part of the statute, are compulsory upon the plaintiff. For the act was made in favor of defendants, and is a remedial law, calculated to give plaintiffs relief up to the extent of the damages sustained, and to protect defendants against the payments of further sums than are in conscience due; and also to take away the necessity of proceedings in equity to obtain relief against an unconscientious demand of the whole penalty, in cases where small damages only have accrued. 5 Durnf. and East, 637. And therefore it is not in the plaintiff's power to refuse to proceed according to the statute, but he *must* assign the breach of such covenants as he proceeds to recover satisfaction for; and if the defendant plead to issue, the jury upon the trial *must* assess damages for such of the breaches assigned as the plaintiff shall prove to have been broken; otherwise the verdict is erroneous, and a *venire de novo* will be awarded. So it is where there is a judgment upon demurrer or by default. *Hardy* v. *Bern*, 5 Durnf. and East, 636; *Roles* v. *Rosewell*, *ibid.* 538; *Drage* v. *Brand*, 2 Wils. 377; *Goodwin* v. *Crowle*, Cowp. 359. Before this act, a plaintiff could only assign *one breach* upon a bond or penal sum for the performance of covenants; for if he assigned several breaches, the declaration was bad for *duplicity*, because the bond was forfeited by the breach of one covenant as much as of several covenants; but in an action of *covenant* he may assign breaches upon every one of the covenants. *Manser's* case, 2 Co. 4, a.

If the defendant had paid the whole debt, that is, the penalty of the

TO BANKERS, FOR LIMITED CURRENT BALANCE.

lent and advanced, paid or discharged by the said [*obligees*], or any of them, their, or any of their executors or administrators, or other such persons or person for the time being carrying on the said business now carried on under the said firm of , to, for, or on the account, or for the use of the said [*principal*], his executors or administrators, or for him and any person or persons with whom he may hereafter enter into partnership, or be concerned in trade, or in which he, his executors or administrators, or other the person or persons last aforesaid shall, by means of an account stated, or in any other manner whatsoever, become indebted to the said [*obligees*], or any of them, or their, or any of their executors or administrators, or the persons

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Payment of penalty into court discharges defendant from further liability.

bond, he might have pleaded the payment in bar of the demand before the statute. 2 Burr. 824. And upon this principle, since the statute it was held in *White* v. *Sealy*, Doug. 49, which was a bond conditioned for payment of rent, that the bond was only a security to the amount of the penalty; and therefore the court ordered, that upon payment by the obligor of the penalty and costs into court, the plaintiff should acknowledge satisfaction on the record. *Vide ante*, 453. So in *Brangwin* v. *Perrott*, 2 Wm. Bla. 1190, which was a bond to indemnify a parish against a bastard child, the court made a like order, that upon payment of the penalty and costs into court the defendant should be relieved from the bond. And in *Wilde* v. *Clarkson*, 6 Durnf. and East, 303, which was also a bond to indemnify a parish against a bastard child, the court ordered, that upon payment of the penalty and costs into court, satisfaction should be entered on the record; and *Lord Lonsdale* v. *Church*, 2 Durnf. and East, 388, was denied. *That* was a bond conditioned to account to the plaintiff for all sums of money received by the defendant as a receiver of the harbour dues of Whitehaven; and it was held, that damages might be recovered for more than the amount of the penalty, and therefore the court refused to stay the proceedings upon payment of the penalty into court. It seems clear, however, that both at law and in equity, the obligee cannot recover more damages against the obligor for a breach of the condition of the bond, than the amount of the penalty and costs; for the bond ascertains the extent of the damage by consent of the parties; if, therefore, the defendant pays the plaintiff the whole stated damages, he cannot desire any more. Therefore, if a bond be conditioned for

TO BANKERS, FOR LIMITED CURRENT BALANCE.

or person for the time being carrying on the trade now carried on under the said firm of . And shall and do well and truly pay, or cause to be paid to the persons or person entitled thereto, interest for such sum and sums of money as aforesaid, at and after the rate of five pounds for every one hundred pounds for a year, to be computed from the time or respective times of advancing, paying, or disbursing the same respectively, or of the same becoming due: And also the lawful and usual commission, charge, and expenses incident or occasioned by the transactions aforesaid, or any of them, whether such payments, advancements, or disbursements shall be by cash, notes, drafts, bills of exchange, or otherwise howsoever, or in whatever manner, or on whatever account the said debts shall become due; *Then* the above written bond or obligation shall be void and of no effect; otherwise the same shall be and remain in full force and virtue. Provided always, *and it is hereby declared and agreed*, that the sum of money to be ultimately recovered on this bond shall be, and is hereby limited, not to exceed the sum of pounds: And that the said [*principal*] and [*sureties*], or either of them, their, or either of their heirs, executors, or administrators, shall not be liable to pay, by virtue thereof, any greater sum than the said sum of pounds: But

with interest thereon;

and commission, &c.

Proviso limiting the amount of the money to be recovered under the bond;

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performance of any act, and the obligee, by reason of the obligor's non-performance, sustains a damage far exceeding the amount of the penalty, yet he can only recover to the extent of the penalty and costs. 6 Durnf. and East, 304; *Clarke* v. *Seton*, 6 Ves. 414, 415. But in an action on a judgment on a bond, interest may be recovered in damages beyond the penalty of the bond. *M'Clure* v. *Dunkin*, 1 East, 436. See further, *ante*, 201; [448.] Vol. II. 289. As the penalty is still the debt, notwithstanding this statute, therefore, where a defendant is arrested for a sum less than the penalty, although greater than the damages assessed by the jury, he is not entitled to costs under the statute 43 Geo. III. c. 46, s. 3. *Cammack* v. *Gregory*, 10 East, 525; *Talbot* v. *Hodson*, 7 Taunt. 254; 2 Marsh, 527, S. C. But it seems that he may maintain an action for a malicious arrest. 1 Saund. 58, *c* [*e*].

For an account of the proceedings under this statute, see 1 Tidd, 604, 2 Tidd, 715, 7th ed. Wms. n. 1 Saund. 58, (1); 2 Saund. 187, (2), and

that this bond shall be a continuing security to that amount for the sums from time to time owing as aforesaid.

but the bond to be a continuing security to that amount.

Patteson and Wms.'s notes to the 5th ed. to which edition, the copious index to the valuable notes is a great improvement; [and *Gillingham* v. *Waskett*, 1 M'Clell. & Younge, 568; *Saville* v. *Jackson*, 1 M'Clell. & Yo. 377. 13 Pri. 715. S. C.]

A Single Bond *or* Bill (*a*), *where the total Amount of the Money secured, or to be ultimately recoverable thereupon, is uncertain, and without any Limit.*

SINGLE BOND FOR UNLIMITED SUM.

KNOW ALL MEN BY THESE PRESENTS, *That* I [*obligor*] of, &c. am held and firmly bound to [*obligee*] of, &c. banker, in *All* and every such sums and sum of money as already have been, or hereafter shall or may be paid or advanced; *and* all and every such sums and sum of money, to pay which a liability or engagement has been, or shall or may be entered into, or incurred by him the said [*obli-*

Single bill from one to one, to secure monies advanced to any amount.

(*a*) Lord Coke says, a *bill* is a single bond, without condition. Co. Litt. 172, a. Lord Chief Baron Comyns says, a single bill is, when a man is bound to another by bill or note without a penalty. Com. Dig. *Obligation*, (C).

A single bond has neither condition nor penalty.

Obligation is a word in its own nature of a large extent; but it is commonly taken in the common law for a bond containing a penalty, with a condition for payment of money, or to do or suffer some act or thing, &c. Co. Litt. 172, a.

An obligation is a bond with a penalty and condition.

In addition to the necessity of a single bond to meet the provision of the last stamp act; *vide ante*, 447, *second class*; by a single bond, an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good

By a single bond an infant may bind himself to pay for necessaries;

SINGLE BOND FOR UNLIMITED SUM.

gee], upon or by reason or means of accepting or paying the drafts, bills, or promissory notes of the said [*obligor*];

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but not by an obligation, because it has a penalty.

teaching or instruction, whereby he may profit himself afterwards. March. 145; 1 Roll. Abr. 729, pl. 7; *Russell* v. *Lee*, 1 Lev. 86. [*Turberville* v. *Whitehouse*, 1 Carr. N. P. C. 94.] But if an infant bind himself in an obligation or other writing with a penalty for the payment of any of those things, that obligation shall not bind him. Co. Litt. 172, a. and Hargr. n. (2); 1 Roll. Abr. 729, pl. 8; Noy's Max. 39. *Fisher* v. *Mowbray*, 8 East, 330.

The necessaries for which an infant may contract.

With respect to the necessaries for which an infant may contract a debt, the question always bears a reference to the condition of the parties. Necessaries do not consist simply in any absolute thing; as in food, clothes, or lodging; but in any article which may correspond with the condition and circumstances of the infant.

It has been determined that an infant, a captain in the army, is liable to pay for a livery ordered for his servant, as necessaries, but not for cockades ordered for the soldiers of his company. *Hands* v. *Slaney*, 8 Durnf. and East, 578. Necessaries for an infant's wife are necessaries for him, but not if provided in order for the marriage. *Turner* v. *Trisby*, Str. 168. Money advanced to release an infant taken in *execution*, may be recovered as necessaries. *Clarke* v. *Leslie*, 5 Esp. 28. per Alvanley, C. J. 1803. But if the infant were in custody upon mesne process, it must be shewn that the debt for which the arrest was made was for necessaries. Regimentals sold to a member of a volunteer corps are necessaries, per Ellenborough, C. J. in *Coates* v. *Wilson*, 5 Esp. 152. So, it seems, money advanced at the request of an infant to a parish officer, to free the infant from supporting his bastard child, is a necessary for which an infant may give a single bill. *Fisher* v. *Mowbray*, 8 East, 330. The question of necessaries is to be governed by the real circumstances of the infant, and not by his ostensible situation. *Ford* v. *Fothergill*, Peak, 229. But the court shall judge what things are necessary. Cro. Eliz. 583.

[If an infant is supplied with proper clothes by his parent, any others furnished by a tradesman cannot be considered as necessaries, it being the duty of a tradesman to make inquiries of the infant's friends before he gives him credit. *Cook* v. *Deuton*, 3 Car. and Payne, N. P. C. 114. *Ed.*]

An infant is not liable for money lent, except it be applied in payment of a just debt.

An infant, however, is not liable for money lent, though laid out in the purchase of necessaries. *Robart* v. *Knouth*, 2 Esp. 472, n. per Buller J. 1783. See likewise 1 Salk. 279. Com. Dig. *Enfant*, (C. 2.) But if one lends money to an infant to pay a debt, and if, in consequence of such loan, he does pay the debt, the infant shall be liable in

or by discounting for him other bills of exchange or promissory notes, or by affording to him other pecuniary assistance; *together* with lawful interest (*b*) for the same

SINGLE BOND FOR UNLIMITED SUM.

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equity; for the lender of the money stands in the place of the person paid, *viz.* the creditor for necessaries, and shall recover in equity, as the creditor would have recovered at common law. So, if one borrows money during infancy, and applies it to the buying of necessaries, and afterwards coming to age, devises his lands for payment of his debts; this debt, contracted during infancy, is within the trust. *Marlow* v. *Pitfield*, 1 P. Wms. 559.

An infant cannot accept a bill of exchange for necessaries. *Williamson* v. *Watts*, 1 Camp. 552. See likewise 1 Carth. 160. Com. Dig. *Enfant*, (C.) 2. It has been thought, however, that he might bind himself by a promissory note for necessaries, by analogy to the ancient doctrine, that a single bill given by an infant for necessaries was binding. But there is a material distinction between a *single* bill and a promissory note; that the former was not negotiable; whilst promissory notes, since the statute of Anne, are upon the same footing as bills of exchange. As a promissory note, therefore, might be endorsed over, it seems that an infant would not be bound by such security, at least not whilst it is in the hands of an indorsee; and in the hands of the person to whom it was originally made payable, it would probably be deemed to have no other qualities than a promissory note had before the statute of Anne, that of being *evidence* of a debt.

An infant, it seems, can only bind himself by single bill.

Assumpsit on an account stated, does not lie against an infant, even though the particulars of the account were for necessaries. *Trueman* v. *Hurst*, 1 Durnf. & East, 40.

The defence of infancy is not to be used as a sword, but as a shield—the law seeks only to protect the infant from the effects of imprudence. Holt's *Nisi Prius* Cases, 78, n.

For other forms of single bonds, see West's Simboleography, *part. primæ, liber secundus*, sec. 101, edit. 1605; 1 Scrivener's Guide, 305, 5th ed.

(*b*) Lord Holt said, that upon a single bill, of a distant time, interest may be recovered in damages: Mod. Cas. 167: though payable upon demand, and no demand proved, where the defendant pleads *non est factum*. *Ibid.* However, in *Hogan* v. *Page*, 1 Bos. & Pull. 337, in an action of debt on a single bond, proceedings were stayed by the Court of Common Pleas, on payment by the obligor of principal and costs, without interest.

Interest is not always recoverable on a single bond:

SINGLE BOND FOR UNLIMITED SUM.

monies respectively, from the time or respective times of advancing the same; and also commission, and all other customary charges, to be paid to the said [*obligee*], or to his certain attorney, executors, administrators, or assigns: *For* which payment to be well and truly made, I bind myself, my heirs, executors, and administrators, and every of them, firmly by these presents. *Sealed* with my seal: DATED this day of , [in the year of the reign of our sovereign Lord *George* the *Fourth*, by the grace of God of the united kingdom of Great Britain and Ireland, King, Defender of the Faith; and] in the year of our Lord one thousand eight hundred and .

Testimonium.

Attestation.

SEALED AND DELIVERED, (being first duly stamped (*c*),) in the presence of }

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never on infant's security.

But an infant can give no security to bind himself for the payment of interest. *Fisher* v. *Mowbray*, 8 East, 330.

Bond in penalty without any day of payment, is payable immediately, and interest may be recovered though not reserved.

But a bond in a penal sum, conditioned for payment of a lesser sum generally, without naming any day of payment, becomes a present debt: therefore, as the principal becomes payable on the day of the date of the bond, interest is payable on such a bond from the date, though not expressly reserved: and upon any action brought upon the bond, the court will refer it to the Master, to compute principal, interest, and costs thereon, and on payment of the same stay the proceedings, by virtue of the 4 Anne, c. 16. s. 13, *ante*, 199. *Farquhar* v. *Morris*, 7 Durnf. & East, 142.

The question of interest is effectually prevented in the above precedent of a single bond, by making an express reservation thereof.

Stamp.

(*c*) Stamp 25*l*. *vide ante*, 447, second class.

PARTICULAR BONDS.

See further as to BOND, titles ANNUITY, ARBITRATION, INDEMNITY, MORTGAGE, and SETTLEMENT; and INDEX TO THE PRECEDENTS, title BOND.

CONFIRMATION.

Confirmation.

A *confirmation* is an approbation of, or assent to, an estate already created; by which the confirmor strengthens and gives validity to it, as far as it is in his power. It has this operation only with respect to estates *voidable* or defeasible; but it has no operation upon estates which are absolutely *void*. Butl. n. Co. Litt. 295, b. (1).

Operative words.

The usual operative words are, "given, granted, ratified, approved, and confirmed." 2 Bla. Com. 325. However, either the three latter, Litt. s. 515, or either of the two former alone, will operate as a confirmation. Litt. s. 531. And such additional words may be mixed with the words of confirmation as may increase or enlarge the estate; but that is effected by the force of such additional words, and, strictly speaking, is foreign to the confirmation. Gilb. Ten. 75.

Operative effect of a confirmation.

A confirmation to a tenant of freehold or inheritance cannot be so worded as to have a less operation than that of confirming his whole estate; consequently, a confirmation to such a tenant, either of the lands, or of his estate in them, for any term or period, is a confirmation of his whole fee. A disseisor always acquires by the disseisin a tortious fee simple; a confirmation therefore to him, however qualified, is a confirmation of his whole fee. It is otherwise in the case of a term for years. A confirmation may be made of part of the term only. The reason of this difference is, that an estate of freehold or of inheritance is considered as integral and indivisible. But as years are several, the term which is composed of them is necessarily fractional and divisible, and may consequently be confirmed in part only, by using proper expressions for this purpose. If a person confirms *the estate* of the tenant for years for part of the term, as the word estate signifies all the interest or term of years which the tenant has, the subsequent words are not considered as qualifications of the former words, but as absolutely repugnant to them; and as both cannot stand together, the law prefers the

first, which are the principal, to the other, which are only secondary. Butl. n. Co. Litt. 297, a. (1).

If there be nothing more than a confirmation of title, there cannot be any uses or trusts; 3 Pres. Abs. 119; because no seisin passes.

So, as there must be a particular estate to support even a vested remainder, which precedent estate must be formed at the same time with the remainder; Plow. 25; therefore, if a reversioner in fee *confirm* the estate of a lessee for years, and limit the remainder, it is void: because the term was antecedent to the remainder, and not created with it by the same instrument at the same time. So if a reversioner *confirm* the estate of tenant for life, the remainder over, such remainder is void: for no change is made in the particular estate. Dr. and Stud. Dial. 11, c. 20. (It is remarkable that this passage of the excellent author is cited so early as by Chief Justice Brooke. Abr. tit. *Done* and *Remainder*, pl. 45; *Estates*, pl. 80.) But if the particular estate existing be by *confirmation enlarged*, as if a reversioner confirm the estate of tenant *pur autre vie* for the tenant's own life, or confirm the estate of tenant for life *in tail*, the remainder over, such remainder is good. 2 Roll. Abr. 415, pl. 8; 18 Vin. Abr. 382. 2 Wooddes. Vinerian Lectures, 178.

Modern deeds called confirmations are not, strictly speaking, confirmations; for being generally by lease and release, they have a more extensive operation than a simple confirmation at common law. For a form of a confirmation at common law, *vide post*, 489, 496.

By whatever method a confirmation is effected, if there be any *suppressio veri aut suggestio falsi*, 3 Inst. 238, the confirmation may be set aside in equity. *Vide ante*, 226; and Vol. I. 156.

RELEASE *by way of* CONFIRMATION *by an Heir at Law of an Estate mentioned to be devised by a Will unattested, and where the Words of the intended Devise extended only to the Life of the Devisee; the Heir claiming a conditional* (*a*) *Benefit under the Will, and thinking that it was the Testator's Intention to give the Fee.*

UNATTESTED WILL, TO DEVISEE IN FEE.

THIS INDENTURE, made the day of , in the year 18 , BETWEEN [*heir*] of, &c. esquire, one of the brothers, and heir at law of [*testator*] late of, &c. esquire, deceased, of the one part; and [*devisee*] of, &c. gentleman, of the other part. WHEREAS the said [*testator*] made and signed his last will and testament in writing, bearing date on or about the day of , 18 , but without being published by him in the presence of, or attested by witnesses, and after thereby bequeathing several pecuniary legacies and annuities to the persons therein named, did give and bequeath to his brother the said [*heir*] an annuity of one hundred pounds a year; *And* the said testator did give his freehold in shire to his nephew [*devisee*], and directed, that if his brother [E. (*heir*)] should lay any claim to it, he might have it, but in that case no other interest in his said will, no more than if his name had not been mentioned: *And* the said testator did nominate his nephew the said [*devisee*] and [T. K.] executors of his said will. AND WHEREAS the said

Parties.

Recital of a will which was signed, but not published in the presence of witnesses:

testator's death and probate:

(*a*) If in an unattested will there is a legacy to the heir, upon condition that he do not dispute the will, he is put to his election. *Boughton* v. *Boughton*, 2 Ves. sen. 12.

UNATTESTED WILL TO DEVISEE IN FEE.

testator [ ] departed this life on or about the day of , 18 , without issue, leaving the said [*heir*] his brother, his heir at law, and without altering or revoking his said will, which hath been duly proved in the Prerogative Court of the Archbishop of Canterbury. AND WHEREAS the signing of the said recited will by the said testator [ ] not having been attested and subscribed in the presence of the said testator by three witnesses, the devise therein expressed to be made of the said testator's freehold estate in shire did not, it is apprehended, pass such freehold estate to his said nephew [*devisee*]; but the said [*heir*], as heir at law of the said testator, being willing to comply with the terms of the said will, and being desirous of fulfilling the intention of the said testator in respect to the devise of the said freehold estate in shire; and being well satisfied that the said testator intended that such devise should carry the fee simple of the said shire estate unto the said [*devisee*], hath, at the request of the said [*devisee*], agreed to confirm the said recited will in respect to the devise therein contained of the said freehold estate in shire, by releasing and assuring the same estate unto and to the use of the said [*devisee*], his heirs and assigns, in manner hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the premises; and for and in consideration of the sum of five shillings of lawful money of Great Britain [and Ireland] to the said [*heir*] in hand paid by the said [*devisee*], at or before the sealing and delivery of these presents; the receipt whereof is hereby acknowledged; *He* the said [*heir*], at the request and by the direction of the said [*devisee*], (testified by his being a party to, and executing these presents,) and according to his estate, right, and interest, but no further or otherwise, *hath* bargained, sold, aliened, released, and confirmed; *And* by these presents *doth* bargain, sell, alien, release, and confirm unto the said [*devisee*], (in his actual possession, &c. *ut ante*, Vol. I. 655.) and to his heirs; *All* and singular the freehold messuages, lands, tenements, and hereditaments which the said testator [ ] was, at the time of his signing the said recited will, seised of or entitled to at law, or in equity, situate, lying, and being in

that will was unattested and defective:

but heir at law is willing to confirm intended devise.

Testatum.

Release in fee from heir at law to intended devisee.

Parcels.

UNATTESTED WILL TO DEVISEE IN FEE.

the county of ; TOGETHER with all houses, &c. (*ut ante*, Vol. I. 656.) AND the reversion, &c. AND all the estate, &c. TO HAVE AND TO HOLD the said messuages, lands, tenements, hereditaments, and all and singular other the premises hereinbefore expressed to be hereby released, with their rights, members, and appurtenances, unto the said [*devisee*], his heirs and assigns for ever; *To the use* of the said [*devisee*], his heirs and assigns for ever. AND THE SAID [*heir*] doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said [*devisee*], his heirs and assigns; that he the said [*heir*] hath not at any time heretofore made, done, executed, committed, or willingly or knowingly suffered, or consented to any act, matter, or thing, whereby or by reason or means whereof the said hereditaments and premises hereinbefore expressed to be hereby released, or any part thereof, are, is, can, shall, or may be impeached, charged, released, conveyed, assured, or in any wise incumbered: AND MOREOVER that he the said [*heir*], and his heirs, and every other person having or lawfully or equitably claiming, or who shall or may have or lawfully or equitably claim any estate, right, title, or demand in, to, or out of the said hereditaments and premises hereinbefore expressed to be hereby released, or any of them, or any part thereof, by, from, through, under, or in trust for him or them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the proper costs and charges in the law of the said [*devisee*], his heirs or assigns, make, do, acknowledge, levy, suffer, and execute; or cause and procure to be made, done, acknowledged, levied, suffered, and executed, all such further and other lawful and reasonable acts, deeds, things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly, lawfully, and absolutely granting, releasing, conveying, and assuring all and singular the hereditaments and premises hereinbefore expressed to be hereby released, or any of them, or any part thereof, with their and every of their rights, members, and appurtenances, unto and to the use of the said [*devisee*], his heirs and assigns for ever, or as he or they shall direct or appoint, be the same by fine, feoffment, common

General words.

Habendum to the use of devisee in fee.

Covenant by heir at law that he hath not incumbered:

and for further assurance.

UNATTESTED WILL TO DEVISEE IN FEE.

recovery, deed inrolled or not inrolled, or any other matter of record, or not of record, or otherwise howsoever; *As* by the said [*devisee*], his heirs or assigns, or his or their counsel in the law, shall be reasonably devised, or advised and required; *So* that any such further assurance or assurances do not contain or imply any further warranty or covenant than against the person or persons who shall be required to make and execute the same, his, her, and their heirs, executors, administrators, acts, and deeds only; *And so* that the person or persons who shall be required to make and execute such further assurance and assurances, be not compelled nor compellable, for the making or doing thereof, to go or travel from his, her, or their usual place or places of residence or abode. IN WITNESS, &c.

UNATTESTED WILL TO TRUSTEE FOR A TERM TO PAY DEBTS; REMAINDER IN TAIL, &c.

CONFIRMATION *by an Heir at Law of a Will executed in the Presence of two* (*a*) *Witnesses only, by a* RELEASE *in Fee, To the Use of a Trustee for* 500 *Years; Remainder, to the Use of a Son or Devisee in Tail; Remainder, to the Use of a Daughter, a Devisee in Fee;* DECLARATION *that the Premises shall be subject to the Payment of such of the Testator's Debts, &c. as they would have been liable to, in case his Will had been duly executed: and that the Term of* 500 *Years was limited to the Trustee to raise Debts, &c. and subject thereto, to attend the Uses limited.*

Parties.

THIS INDENTURE, made the day of , 18 , BETWEEN [*heir*] of, &c. (eldest son and heir of

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(*a*) By the statute of frauds and perjuries, 29 Car. II. c. 3, s. 5 and

UNATTESTED WILL TO TRUSTEE FOR A TERM, TO PAY DEBTS; REMAINDER IN TAIL, &C.

[*testator*] late of, &c. deceased), of the first part; [G. D.] of, &c. of the second part; [W. D.] of, &c. (son of the said [*testator*], deceased,) of the third part; and [M. H.] of, &c. and Mary his wife, (daughter of the said [*testator*],) of the fourth part. WHEREAS the said [*testator*], deceased, made his last will and testament in writing, bearing date the day of , and thereby, after giving several specific and pecuniary legacies, which he directed should be discharged by his said son [W. D.], after directing him also to pay his debts and funeral expenses, he gave to him all his real and personal estates for him and his heirs for ever: *And* if he should die without issue, then he devised the same to his daughter, the said Mary H. then Mary D. and her heirs. AND WHEREAS the said [*testator*] the father, was at the time of making his said will, and at the time of his decease, seised of or entitled to a considerable real estate, comprising the messuages and hereditaments hereinafter mentioned to be hereby released: AND in regard that the said will of the same [*testator*] was executed by him in the presence of, and attested by two witnesses only, the same is void, and ineffectual in law, so far as the same relates to his said real estate; and consequently the same estate, by and upon his decease, descended and came to the said [*heir*], party hereto, as his heir at law. AND WHEREAS the said [*heir*], party hereto, out of his great regard to the memory of his said father, and in order to do justice to his intention expressed in his said will, has

Recital of will:

that testator was seised of real estate:

that will was executed in the presence of two witnesses only:

that heir has agreed to convey the real estate as hereinafter mentioned.

12, will of fee simple lands or tenements, or any estate *pur auter vie*, must be signed by the testator, or by some person for him in his presence, and by his direction, and be attested and subscribed in his presence by three witnesses.

There must be three witnesses to a valid devise of an estate in fee simple, or *pur auter vie*.

In a devise of a trust or equitable estate in freehold lands or tenements, the formalities of execution and attestation required by the statute, are as necessary to be observed as in wills disposing of the legal estate. *Wagstaff* v. *Wagstaff*, 2 P. Wms. 258.

By the 55 Geo. III. c. 192, dispositions by will of copyhold estates are made effectual without previous surrenders to the uses thereof; but no particular ceremonies are requisite to the validity of such a disposition. [See *post*, 533.]

But no witness is requisite to a testamentary disposition of copyholds.

UNATTESTED WILL TO TRUSTEE FOR A TERM, TO PAY DEBTS; REMAINDER IN TAIL, &c.

proposed and agreed to convey, settle, and assure the said real estate to the uses, and in manner hereinafter mentioned, expressed, and declared of and concerning the same. NOW THIS INDENTURE WITNESSETH, that for the end and purpose aforesaid, and in consideration of ten shillings of lawful money of Great Britain [and Ireland] to the said [*heir*], party hereto, in hand paid by the said [G. D.], at or before the sealing and delivery hereof; the receipt whereof is hereby acknowledged; *He* the said [*heir*] *hath* bargained, sold, released, and confirmed; *And* by these presents *doth* bargain, sell, release, and confirm unto the said [G. D.], his heirs and assigns (in his actual possession, &c. *ut ante*, Vol. I. 655). ALL, &c. AND all other the messuages, buildings, hereditaments, and other real estate late of him the said [*testator*], deceased, which at the time of his making his said will, and at the time of his death, he was seised of or entitled to either at law or in equity. [*Add* general words; reversion; and all the estate, &c. *ut ante*, Vol. I. 656.) TO HAVE AND TO HOLD the said messuages or dwelling houses, hereditaments, and premises mentioned and intended to be hereby released, with their appurtenances, unto the said [G. D.], his heirs and assigns, To and for the several uses, upon the trusts, and subject to the declarations and agreements hereinafter expressed and declared of and concerning the same; that is to say; To THE USE of the said [G. D.], his executors, administrators, and assigns, for and during, and unto the full end and term of five hundred years now next ensuing, and fully to be complete and ended: AND from and after the end or other sooner determination of the said term, To THE USE of the said [W. D.], and the heirs of his body lawfully to be begotten: AND in default of such issue, To THE USE of the said [M. H.], her heirs and assigns for ever. [*Add* covenant from [*heir*] to [W. D.] for further assurance.] AND *it is hereby agreed and declared* by and between the parties hereto, that the messuages, hereditaments, and premises hereinbefore mentioned to be hereby released, shall be subject and liable to the payment of so much and such part of the debts and funeral expenses of the said [*testator*], deceased, and of the legacies in his said will mentioned, so far as, and no farther or otherwise than

Testatum. Release in fee from heir.

Parcels. Sweeping clause.

General words.

Habendum to releasee in fee.

To the use of trustee for 500 years;

Remainder,

To the use of a son, a devisee in tail; Remainder, To the use of a daughter, a devisee in fee.

Declaration, that the premises shall be subject to the payment of such of the testator's debts, &c. as they would have been liable to

the same premises would have been subject and liable to the payment thereof in case the same will had been duly executed, as the law requires, for the disposition of real estates. AND *it is hereby also agreed and declared*, that the said premises are and were so limited to the said [G. D.], his executors, administrators, and assigns, for the said term of five hundred years, UPON TRUST by mortgage of the same premises, to raise and satisfy so much and such part of the said debts, funeral expenses, and legacies accordingly: AND that subject to the same trust, the said term shall attend the several uses hereinbefore declared concerning the premises therein comprised. IN WITNESS, &c.

in case his will had been duly executed: and that the term of 500 years was limited to trustee, to raise debts, &c.

and subject thereto, to attend the uses limited.

CONFIRMATION *of a Will by an Heir at Law, to prevent the necessity of proving it in Chancery* (*a*)*; being a* RELEASE *in Fee, and of Leasehold for Lives; with a* COVENANT TO SURRENDER *Copyholds to the Trustees of the Will, to be held to and for the Uses, and upon the Trusts declared by the Will, and to be subject to the Sums of Money thereby charged on the Lands.*

RELEASE IN FEE, AND FOR LIVES; AND COVENANT TO SURRENDER COPYHOLDS.

THIS INDENTURE, made the day of , in the year of our Lord 18 , BETWEEN [*heir*], of, &c. spinster, (cousin and heir at law of [*testatrix*], late of, &c. spinster, deceased), of the one part; and [*trustee*] of, &c.

Parties.

(*a*) "CASE.

"See copy of the will of J. H. left herewith, which was made 15 years since.

"The witnesses were of the following ages at the time of the publication of the will; viz.; George H. about thirteen years, Samuel M.

Case, and the opinion of counsel, on the validity of a devise attested by two infants and one adult.

RELEASE IN FEE, AND FOR LIVES; AND COVENANT TO SURRENDER COPYHOLDS.

and [*other trustee*] of, &c. of the other part. WHEREAS the said [*testatrix*] made and executed her last will and testament in writing, bearing date the day of , 18 , and in the words following; that is to say; "This

Recital of will in *hæc verba*:

is the last will and testament of me," &c. [*state the will, and the signature and attestation, in the very words.*] AND the said [*testatrix*] afterwards departed this life, without revoking or altering her said will, leaving the said [*heir*] her cousin and heir at law. AND WHEREAS the said [*testatrix*] was, at the time of making her said will, and at the time of her decease, seised of the inheritance in fee simple in possession of and in the manor of , and of and in divers freehold and copyhold messuages, lands, tenements, tithes, and hereditaments, situate and being, or arising in, &c. and hereinafter mentioned, and intended to be hereby released; and was also seised or entitled to divers leasehold messuages, lands, and tenements, situate and being at aforesaid, and held by several leases respectively made for three lives by the late Lord Bishop of Durham to the said [*testatrix*]. AND WHEREAS the said [*heir*], having no reason to entertain a doubt, either with respect to the sanity of the said [*testatrix*] at the time of making her said will, or with respect to the due

death of testatrix:

seisin of freehold, copyhold, and leasehold for lives:

agreement to confirm;

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about eleven years and a half, and Hannah P. about twenty-three years. The two first witnesses signed their own names; Hannah P. made a mark, and the testator wrote the words, 'Hannah P.'s mark.' Although Hannah P. signed by a mark, yet she has a perfect recollection of the whole of the transaction. The three witnesses are all living, and capable of attesting their several signatures; and were at the time of the publication of the will, and are at the present period, of good understanding and discretion.

"Your opinion is requested,

"Whether, under the above mentioned circumstances, these three witnesses are competent, and sufficient to prove the will of J. H.?"

"Perhaps the will may be supported, but a purchaser cannot be advised to accept the title without a confirmation from the heir at law, or a decree establishing the will *per testes*.

RELEASE IN FEE, AND FOR LIVES; AND COVENANT TO SURRENDER COPYHOLDS.

execution thereof; and being satisfied it was her intention, at the time of making and executing her said will, that the said manor, messuages, lands, tithes, hereditaments, and real estate should go to, and be held and enjoyed by the several persons, in such order, course, and succession, and for such estates and interests, and subject to such charges and annuities, as in the said will are mentioned; she the said [*heir*], in order to do justice to that intention, as expressed in the said will, and to prevent the expense of proving the same in a court of equity, for the perpetuating the testimony of the witnesses thereto (*b*), is very willing and desirous that the said will, and all the devises and bequests thereby made, shall in all things be confirmed and made good and effectual, according to the purport and the true intent and meaning thereof. NOW THIS INDENTURE WITNESSETH, that for attaining the ends and purposes hereinbefore mentioned, and in consideration of ten shillings of, &c. *she* the said [*heir*], *hath* bargained, sold, released, and *confirmed; And* by these presents *doth* bargain, sell, release, and confirm unto the said [*trustees*], (in their actual possession, &c. *ut ante*, Vol. I. 655,) and to their heirs, *All* that, &c. (*add* general words; reversion; and all the estate, *ut ante*, Vol. I. 656.) TO HAVE AND TO HOLD the said manor, messuages, lands, tithes, hereditaments,

First testatum. Release of the fee simple lands.

Habendum to the trustees in fee,

"It is not sufficient that there should be attesting witnesses; they must be credible, that is, competent witnesses.

"They are to be judges of the sanity of the testator, but in general, for in very few instances, are persons of the age of eleven or thirteen competent to judge of the sanity of a testator or the circumstances under which his will is made: and I should not be surprised to find, that the court came to the resolution, that a witness of the age of eleven years was, in no case, a witness competent to attest the execution of a will of real estate.

"12th Nov. 1817."

That the above opinion cannot be supported, seems very clear. The will was made fifteen years before the question arose. The witnesses were all of them living; and they were persons of the clearest reputation, and had a perfect recollection of the execution of the will: they

(*b*) It is always preferable, that the heir at law should be apprised of the ground on which his confirmation is required.

RELEASE IN FEE, AND FOR LIVES; AND COVENANT TO SURRENDER COPYHOLDS.

ments, and all and singular other the premises hereby granted, released, and confirmed, or intended so to be, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, unto the said [*trustees*], their heirs and assigns, To and for the several uses, upon the trusts, and to and for the intents and purposes, and with, under, and subject to the powers, provisoes, and declarations expressed and declared of and concerning the same premises, or any part or parts thereof, in and by the said will of the said [*testatrix*], and subject to the several annuities and sums of money therein given and devised, to be paid by and out of the same premises, or some part or parts thereof. AND THIS INDENTURE FURTHER WITNESSETH, that for attaining the ends and purposes, and for the considerations hereinbefore mentioned, *She* the said [*heir*], *hath* bargained, sold, released, and confirmed, *And* by these presents, *doth* bargain, sell, release, and confirm unto the said [*trustees*], in their possession (*c*), &c. (*ut ante*, Vol. I. 655.) and to their heirs, ALL THOSE, &c. (*describe the leasehold premises;* add general words for farms, *ut ante*, Vol. I. 656, reversion, &c. and all the estate, &c.). TO HAVE AND TO HOLD the said, &c. hereby lastly granted, released, and confirmed, or intended so to be, and every part and parcel thereof, with their and every of their appur-

To the uses, and upon the trusts of the will.

Second testatum. Release of the leaseholds for lives.

Habendum to the trustees, To the uses, and upon the trusts of the will.

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were only required to prove after their majority, a fact which occurred during their infancy.

Besides, it is clear, that if an infant be of the age of *fourteen* years, he is of the age of discretion to be sworn as a witness; Gilb. Evid. 4th ed. 144, 6th ed. 130; and *before*, if he appears to understand an oath, or rather, as it is expressed by Lord Hale, hath *competent* discretion. 2 Hale's P. C. 278, Wilson's ed. ch. xxxvii. Hargr. n. Co. Litt. 172, b. (1).

There seems to be no precise age fixed, at which infants are excluded from being witnesses. At one time, indeed, their age was considered as the criterion of their competency; and it was a general rule, that none could be admitted under the age of nine years, very few under ten; *Rex* v. *Travers*, 2 Str. 700; and cases in East, P. C. 442, S. P.; 1 Hale's P. C. 302; 2 Hale's P. C. 278; *Young* v. *Slaughterford*, 11

(*c*) On the transfer and surrender of estates for lives, *vide ante*, 172, (*a*).

RELEASE IN FEE, AND FOR LIVES; AND COVENANT TO SURRENDER COPYHOLDS.

tenances, unto the said [*trustees*], their heirs and assigns, for and during the several estates, terms, and interests thereof respectively granted in and by the several leases by which the same are now respectively held, *To* and for the several uses, &c. *ut supra*, or as near thereto as may be, and the nature of the estates will admit of. AND THIS INDENTURE FURTHER WITNESSETH, that for attaining the ends and purposes, and for the considerations hereinbefore mentioned, *She* the said [*heir*], doth hereby for herself, her heirs, executors, and administrators, covenant, promise, and agree with and to the said [*trustees*], their heirs and assigns, that she the said [*heir*] shall and will, at the request, costs, and charges of the said [*trustees*], their heirs or assigns, surrender into the hands of the lord or lords, lady or ladies of the said manor of for the time being, according to the custom of the said manor, ALL THOSE several pieces or parcels of land, situate, lying, and being at , within the said manor of , and containing by estimation, &c. AND all other the lands, tenements, and hereditaments whatsoever, late of her the said [*testatrix*], deceased, holden of the said manor by copy of court roll, with their rights, members, and appurtenances, To the use of the said [*trustees*], their heirs and assigns for ever, according to the custom of the said

Third testatum. Covenant to surrender copyholds.

Parcels.

Sweeping clause.

To the use of trustees,

Mod. 228; 2 Hawk. P. C. bk. 2. ch. 46, s. 27; which was in some measure denying them the protection of law against secret acts of violence. Bull. N. P. 293. A more reasonable rule has been since adopted: and the admissibility of children is now regulated, not by their age, but by their apparent sense and understanding. In *Brazier's* case, on an indictment for assaulting an infant of five years of age with intent to ravish her, it was agreed by all the judges, that children of any age might be examined on oath, if capable of distinguishing between good and evil: but that they cannot be examined in any case without an oath. *Brazier's* case, 1799. 1 East, P. C. 443, 444; Bull. N. P. 293; 1 Leach, Cr. C. 237; 4 Bla. Com. 214. This is now the established rule in all cases, criminal as well as civil, and whether the prisoner is tried for a capital offence, or for one of an inferior nature. When the child has appeared not sufficiently to understand the nature and obligation of an oath, judges have often thought it necessary, for the purpose of justice, to put off the trial of the prisoner, directing that the

To the uses, and upon the trusts of will. Proviso, that these presents shall not prejudice an annuity given to heir by the will.

manor, ; To and for the several uses, &c. (*ut supra*), or as near thereto as may be, and the nature of the estates will admit. PROVIDED ALWAYS, *and it is hereby agreed and declared*, that these presents, or any thing herein contained, shall not defeat or prejudice, nor be construed, deemed, or taken to defeat or prejudice the said annual sum of pounds in and by the said will of the said [*testatrix*], given to, or directed to be paid to the said [*heir*] during her life. IN WITNESS, &c.

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child in the mean time should be properly instructed. 1 Phillips on Evidence, 18, 6th ed. Archbold on Pleading and Evidence, 388.

To obviate every difficulty in the case above referred to, the recital in the deed of confirmation contained these words:

"And the said testator signed, sealed, published, and declared his said last will and testament in the presence of George H., of, &c. then an infant of about the age of thirteen years, Samuel M., of, &c. then also an infant of about the age of eleven years and a half, and Hannah P., of, &c. AND the said George H. and Samuel M. subscribed their respective names, and the said Hannah P. subscribed her mark to the said will, in the presence of the said testator, and of each other."

That no objection existed on account of Hannah P.'s signing by a mark, is very clear. *Vide ante*, Vol. II. 659, (*b*).

CONFIRMATION *of a Devise by the Testator's Heir at Law* (*a*).

IN FEE TO DEVISEE.

TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME. [*Heir*] of, &c. (brother and heir at law of [*testator*] late of, &c.) and [*devisee*] of, &c. (eldest son and heir apparent of said [*heir*], and the sole devisee of the real estate, and Exordium.

(*a*) CASE, with Mr. BOOTH'S opinion on the above mentioned devise. Case.

"I Edward T. H. G., of, &c. being of sound and disposing mind, &c. do, on the day of , one thousand seven hundred and seventy-two, constitute and appoint my brother I. H. and my nephew T. H., eldest son of the said I. H., to be joint executors and administrators, and do desire them earnestly to see it executed. As to my personal estate I give as follows: *imprimis*, I give unto my nephew I. H., second son to my brother I. H., my gold watch, provided he can have it to his own use and benefit, and for his own property; also one hundred pounds, on the same condition: otherwise he is not to enjoy them; this to be at the pleasure of my brother and nephew. *Item*. I give, &c. to , to be paid him by my heir and nephew T. H. *whom I do appoint my heir*. *Item*. I give, &c. to H. H., third son of my said brother I. H. to be paid him by my heir and nephew T. H., within, &c. *Item*. I give and bequeath unto the above named T. H. all my real and personal estate, (except as herein excepted) likewise my allotment of waste ground, to be assigned as my share in the parish of K. I give to the said T. H. *Item*. &c. to be paid by my heir."

"Note. The heir at law of the testator is his brother I. H. the father of the devisee T. H., whom the testator by his will constitutes *his heir*. The testator died a Roman Catholic, and seised of a real estate of considerable value.

"*Qu*. Whether T. H., the nephew and devisee, takes under the will

IN FEE TO DEVISEE.

the residuary legatee of the personal estate, and also one of the executors named in the last will and testament of the said [*testator*], SEND GREETING. WHEREAS the said [*testator*] did, on or about the day of last past, make his last will and testament in writing, and did duly sign, seal, publish, and execute the same in such manner, and with such usual forms and ceremonies attending the execution thereof as the law prescribes and requires for rendering the devises of lands and hereditaments valid and effectual: AND which said last will and testament is in the words, or to the purport following; that is to say; "I Edward T. H. G., of, &c. (*set out the whole of the will and the attestation, with the signatures.*) AND WHEREAS said [*testator*] departed this life on or about the day of last past, without revoking or altering his said will: AND the said [*devisee*], since his death, hath alone duly proved the said will in the Prerogative Court of the Archbishop of Canterbury: AND he hath also caused the said will to be inrolled in his Majesty's Court of Common Pleas, at Westminster. AND WHEREAS upon the death of the said [*testator*], the said [*devisee*], by virtue of the said will, entered upon the real estates whereof the said [*testa-*

Recital of will in *hæc verba*:

Death of testator,

and proof of will:

inrolment of will (he being a papist):

seisin by devisee,

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any greater estate than an estate for life in the testator's real estate? Or will the express appointment by the testator in his will of said T. H. to be his heir, so operate as to give him an estate in fee?

"I. H. the heir at law of the testator, and father of the devisee T. H., is willing to execute any deed, and thereby to convey to his son whatever interest he may have in the testator's real estate, so as to give his son an estate in fee.

"Please to advise, whether such a deed is necessary."

Opinion.

"Laying the circumstances of Mr. H.'s being a papist, or a person making profession of the popish religion, out of the case, I think, by the testator's giving him all his real and personal estate, and making him his heir, he has given to the said T. H. an estate in fee simple in all his lands, and the absolute property in all his personal estate. But if the said T. H., at the time of the devise, was a person making profession of the popish religion, he would, by the statute 11 and 12 W. III. be disabled to take under that devise; such taking being a purchase within that act, and therefore absolutely made void thereby. But,

IN FEE TO DEVISEE.

with heir's privity. Preliminaries leading to confirmation.

tor] was seised at the time of his death, and is now in the actual possession thereof, and in the quiet and peaceable enjoyment of the rents and profits thereof: which possession and enjoyment is with the entire privity, approbation, and consent of said [*heir*] his father. BUT although it plainly appears, from the whole tenor of the said will, that it was the intention of the said testator thereby to give and devise unto said [*devisee*] an absolute estate of inheritance in fee simple of and in all the real estates whereof the said testator should die seised; *And* although it is apprehended that there are in the said will words of legal import and operation, sufficient to pass such an estate to the said [*devisee*], and that by virtue of the said will he the said [*devisee*] is become seised of or well entitled to the inheritance in fee simple of and in all the real estates whereof the said [*testator*] was seised at the time of his death: *Yet* to obviate all doubts and difficulties which may arise, should a contrary construction at any time hereafter be contended for, and more particularly for facilitating the sale of the estates, should the said [*devisee*] hereafter be inclined to sell and dispose of the same, he the said [*devisee*] hath therefore applied to the said [*heir*] to ratify

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then the consequence would be, that instead of the said T. H.'s taking the fee simple under the said will, (which will would be a nullity in that case), such fee simple would descend to the testator's heir at law, who is Mr. I. H., the testator's elder brother, as I apprehend. And there being such a perfectly good understanding between the father and the son, as is stated in this case, I suppose there can be no danger of any other of the sons taking any advantage of their father, Mr. I. H.'s own incapacities under the said statute, by their conforming and becoming Protestants; for the statute disables Papists from having during their lives the benefit even of a descent, and gives the pernancy of the profits of the lands descended during their lives to the next Protestant of kin: and so there is a temporary disability, even in the case of a descent. It might be right, in the present case, for Mr. I. H. to let his right pass on to his son T. by descent at his death. However, it would not be amiss if Mr. I. H. should execute a deed, ratifying and confirming the estate to his son T., and covenanting not to do any thing during his life to impede or interrupt his son in having the full benefit of the lands devised, and letting his right thereto pass on to his son T. by

IN FEE TO DEVISEE.

and confirm the said will, and the estate of inheritance in fee simple thereby devised to the said [*devisee*] of and in the said testator's real estates. AND the said [*heir*] being perfectly well satisfied that the said [*testator*] his late brother was of sound and disposing mind, memory, and understanding at the time of the making and publication of his said will; and that the same will was executed and attested in such manner as by law is required for devising real estates. AND the said [*heir*] being thoroughly convinced that it was the intention of the said testator to give and devise by his said will unto the said [*devisee*] an absolute estate of inheritance in fee simple of and in all the testator's real estates, he hath therefore most readily and willingly consented and agreed to ratify and confirm such an estate therein to the said [*devisee*], and to join in and execute any act or deed whatsoever for that purpose, and for establishing the will of the said [*testator*]. NOW THEREFORE THESE PRESENTS WITNESS, that for effectuating the purposes aforesaid, and from the great regard which the said [*heir*] hath to the memory of his said late brother, and that his intention in the disposition of his real estates to the said [*devisee*] may not be defeated; and in considera-

Testatum.

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descent. But, where Papists are in danger of claims of this kind, the only very safe way is, to make sale of the lands with all convenient speed, and in the mean time to mortgage and incumber the same to Protestant lenders for as much money as they can.

"JAMES BOOTH,
"Lincoln's Inn, 27th January, 1773."

Statement of the statutes, so far as relates to the lands of Papists.

By the 11 and 12 W. III. c. 4. it was enacted, that, a person educated in the popish religion, or professing the same, who did not, in six months after the age of sixteen, take the oaths of allegiance and supremacy, and subscribe the declaration of the 30 Cha. II. of their disbelief of the doctrine of transubstantiation, and their belief that the invocation of the saints, and the sacrifice of the mass are idolatrous, should, in respect of himself only, and of his heirs or posterity, be disabled to inherit, or take lands by descent, devise, or limitation, in possession, reversion, or remainder: and that during his life, till he took the oaths, and subscribed the declaration against popery, his next of kin, who was a Protestant, should enjoy the lands, without accounting

tion of the natural love and affection which the said [*heir*] hath for said [*devisee*], and in order to quiet and establish the seisin of the said [*devisee*] of and in all the real estates whereof the said [*testator*] was seised or possessed at the time of his death; and in order to ratify, confirm, and establish his said will, and also in consideration of five shillings of lawful money of Great Britain [and Ireland] by the said [*devisee*] to the said [*heir*] in hand well and truly paid at or before the sealing and delivery of these presents; the receipt whereof is hereby acknowledged; and for divers other good causes and valuable considerations him hereunto moving; *He* the said [*heir*], *hath* remised, released, ratified, and confirmed, and for ever quitted claim; *And* by these presents doth remise, release, ratify, confirm, and for ever quit claim unto said [*devisee*], his heirs and assigns, All and singular the real estates whereof the said [*testator*], or any person or persons in trust for him, was or were seised, possessed of, or interested in or entitled to

IN FEE TO DEVISEE.

Confirmation.

Parcels.

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for the profits; and should be incapable of purchasing; and that all estates, terms, interests, or profits out of lands made, done, or suffered to his use, or in trust for him, should be void. By 3 Jac. I. ch. 5. 1 W. and M. c. 26. 12 Anne, st. 2, ch. 14. and 11 Geo. II. c. 17. Papists, or persons professing the popish religion, were disabled from presenting to advowsons * and other ecclesiastical benefices, and to hospitals, and other charitable establishments. [And see Vol. I. 182, n. (*a*)].

By a statute made in the second session of the 1st year of Geo. I. c. 55, they were required to register their names and estates in the manner, and under the penalties therein mentioned; and by the 3d Geo. I. c. 18, continued by several subsequent statutes, an obligation of enrolling their deeds and wills was imposed on them.

On the construction of the 11 and 12 W. III. ch. 4, it had been held,

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* This part of the act still remains in force. However it is often evaded; for, when a Papist is possessed of an advowson, he generally conveys the next presentation to some Protestant friend, *In trust* to present such person as the Protestant shall think fit. When the living becomes vacant, the Protestant presents the Papist's nominee.

A Papist may indirectly present to a benefice.

A Jew may present to an advowson.

IN FEE TO DEVISEE.

at the time of the death of the said [*testator*]. AND all the estate, &c. of the said [*heir*] of and in the said real estates, and every of them, and every part thereof. So that neither he the said [*heir*], his heirs or assigns, or any other person or persons in trust for him or them, or in his or their name or names, or in the name, right, or stead of any of them, shall or will, can or may, by any ways or means hereafter, have, claim, challenge, or demand any estate, right, title, or interest of, in, to, or out of the same real estates, or any of them, or any part of them, or any of them. BUT that he the said [*heir*], his heirs and assigns, and every of them, from all estate, right, title, interest, property, claim and demand of, in, to, or out of the same real estates, or any of them, or any part thereof, are, is, and shall be by these presents for ever excluded and debarred (*b*). AND THE SAID [*heir*], for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said [*devisee*], his heirs and assigns, that he will not do

All the estate. So that confirmor, and those claiming under him, may be for ever debarred.

Covenant that confirmor will not incumber:

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that, as it expressly confined the disability of Papists to take by descent to themselves only, and preserved their heirs and posterity from its operation, it was not to be construed as preventing the vesting of the freehold and inheritance in them, in cases of descent, or transmitting them to their posterity: but that the disability respected only the pernancy of the profits, or beneficial property of the lands, of which it deprived them during their nonconformity. Whether that part of the statute which relates to their taking by purchase should receive the same construction, was a frequent subject of discussion, the statute being, in that branch of it, without any limitation. To remedy this, the act of the 3d Geo. I. c. 18. was passed: it enacts, that no sale for a full and valuable consideration by the owner, or reputed owner of any lands, or of any interest therein, theretofore made, or thereafter to be made to a Protestant purchaser, shall be impeached, by reason of any disability of such Papist, or of any person under whom he claims, in conse-

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A confirmation may be either with, or without an habendum.

(*b*) Littleton says, "it is a good and sure thing in every confirmation to have these words: *to have and to hold* the tenements, &c. in fee, or in fee tail, or for term of life, or for term of years, according as the case is, or the matter lies." Litt. s. 523. Lord Coke adds, "this is good counsel, and worthy to be observed." Co. Litt. 298, b. However, an habendum is not indispensable in a confirmation; [nor to any other deed. Touchst. 76. 2 Roll. Abr. 65.].

any act during his life to incumber, &c. AND FURTHER, that he the said [*heir*] shall and will, at any time or times hereafter, upon the request of the said [*devisee*], his heirs or assigns, &c. (*for further assurance*). IN WITNESS, &c. for further assurance.

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quence of the 11 and 12 W. III., unless the person taking advantage of such disability shall have recovered before the sale, or given notice of his claim to the purchaser, or before the contract for sale shall have entered his claim at the quarter sessions, and *bonâ fide* pursued his remedy. The act then recites the clauses of the 12 and 13 W. III. disabling Papists from purchasing; and afterwards enacts, that these clauses shall not be thereby altered or repealed, but shall remain in full force. This proviso is couched in such general words, that it created a doubt in some, whether it did not nearly frustrate the whole effect of the act. To this it was answered, that, notwithstanding the proviso, the enacting part of the statute was in full force for the benefit of a Protestant purchaser; and that the proviso operated only to declare, that Papists themselves should not derive any benefit from the act in any purchases they should attempt to make under the foregoing clauses. This was considered the better opinion, and on the authority of it many purchases of considerable consequence were made. See also 6 Geo. II. ch. 5.

Statutes for the relief of papists.

By the 18 Geo. III. ch. 60, it was enacted, that so much of the 11 and 12 W. III. as related to the prosecution of popish priests and jesuits, and imprisoning for life papists who keep schools, or to disable papists from taking by descent or purchase, should be repealed, as to all papists or persons professing the popish religion claiming under titles not thentofore litigated, who, within six months after the act passed, or their coming of age, should take the oath thereby prescribed. The 31 Geo. III. c. 32, repeals the laws requiring the deeds and wills of Roman Catholics to be registered or inrolled. Butler n. Co. Litt. 391, a. See also 43 Geo. III. c. 30; *et ante*, Vol. II. 187-8.

CONFIRMATION, RELEASE IN FEE, AND ASSIGNMENT ON TRUSTS FOR SALE.

CONFIRMATION *by the Heir at Law of a Devise in Fee:* RELEASE *in Fee by the Heir at Law and the other Children of the Testator, all beneficially interested under the Will; and* ASSIGNMENT *by all of them of Leaseholds,* Upon trust *to sell the Lands, when the Youngest Child comes of Age, at which Time he is to execute the Deed: with a partial* POWER OF PREEMPTION *to the Heir at Law, and* ADMISSION *by the other Children that some Lands interlined in the Will did not pass thereby; but descended to the Heir at Law.*

THIS INDENTURE, made the day of , in the year one thousand eight hundred and ,

Parties.

BETWEEN [*heir*] of, &c. esquire, the eldest son and heir at law of [*testator*], late of aforesaid, clerk, deceased, of the first part; the said [*heir*], party hereto (*a*), and [*daughter*], spinster, [*daughter*], spinster, [*son*], solicitor, and [*infant daughter*], spinster, all of aforesaid, the other children of the said [*testator*], deceased, and which [*infant daughter*] is to execute these presents after she shall have attained her age of twenty-one years, of the second part: [*widow*] of aforesaid, widow, heretofore the widow of the said [*testator*], deceased, [*another trustee*] of , in the county of , clerk, and [*the other surviving trustee*] of , in the county of ,

Infant to execute when of age.

"Party hereto."

(*a*) "Party hereto," because the heir's and his father's christian and surnames were the same.

esquire, (the surviving devisees in trust named in the last will and testament of the said [*testator*], deceased,) of the third part. WHEREAS the said [*testator*], deceased, by his last will and testament in writing, bearing date on or about the day of , one thousand eight hundred and , gave unto the said [*widow*], [*other trustee*], [*deceased trustee*], since deceased, and the said [*other surviving trustee*], *All* his freehold messuage and lands at , in the said county of , with the appurtenances respectively thereunto belonging; *And also* all his freehold tenement and garden, with their appurtenances, at , in the county of ; *And also* all his freehold tenements, orchards, and garden, with the appurtenances thereunto belonging, at , in the county of , then late his brother Peter's, and known by the name of ; *And also* all his freehold piece of land or field, then lately purchased of John Jones, lying and being in the said parish of ; *And also* all the reversion in fee of all that messuage, orchard and garden, and also a field called close, likewise an orchard called , with the fruit trees, timber, and appurtenances thereunto belonging; *And also* all that lifehold messuage or tenement, orchard, and garden then late , with their appurtenances, situate also at aforesaid: *To hold* to them, their heirs, executors, administrators, and assigns respectively, *Upon the trusts*, and to and for, and upon the several uses, intents, and purposes therein and hereinafter mentioned; that is to say; *In trust* to receive and pay, and apply the rents, profits, and proceeds of his said real and lifehold estate, and also the reversions in fee aforesaid, or such part thereof as might be necessary unto and for the equal maintenance and education of his five children, namely, the said [*all his before named children*], and such other child or children as he might thereafter have by his said wife, either born in his lifetime, or within ten months after his decease, during their respective minorities; and also until the youngest child then born, or to be born as aforesaid, should have attained the age of twenty-one years, if he or she should so long live. *And* the testator declared his will to be, that if the said trustees should think it necessary, they might and

CONFIRMATION, RELEASE IN FEE, AND ASSIGNMENT ON TRUSTS FOR SALE.

Recital of devise in fee, and for lives,

to trustees,

In trust to pay rents for the maintenance of children, until youngest comes of age:

CONFIRMATION, RELEASE IN FEE, AND ASSIGNMENT ON TRUSTS FOR SALE.

should apply part of the principal (*b*) of his real or lifehold estate, for the maintaining, educating, apprenticing, or placing out, or otherwise for the benefit of all or any, or either of his said children; provided the money so applied should not exceed the equal share of such child or children for whose use the same should be respectively applied. *And* when and as soon as the youngest children should have attained the age of twenty-one years, *To the use* of, and in trust for his several children then born, or to be born as aforesaid, their heirs, executors, administrators, and assigns, to be lawfully conveyed to them respectively in equal proportions, as tenants in common. *And* it was by the said testator in his said will provided, that if any or either of his said children should die under the age of twenty-one years, or before the youngest should have attained the age of twenty-one years as aforesaid, without leaving any issue of his, her, or their body or bodies, then the said testator willed, that the share or shares of him, her, or them so dying, should go over and be to and for the use and benefit of the survivor or survivors of them, their heirs, executors, administrators, and assigns respectively, in equal proportions if more than one; *And* if all his children but one should die before attaining the age of twenty-one years, unmarried and without issue as aforesaid, then the whole to and for the sole use and benefit of such one survivor, his or her heirs, executors, administrators, and assigns; subject however, in that case, to the payment of one hundred pounds apiece to two of the testator's sisters, namely, [ ] and [ ]. *And* in the said will are several other limitations over of the said lands, hereditaments, and premises, in case all the said testator's children should die before attaining the said age of twenty-one years, unmarried and without leaving issue. *And* the said testator appointed the said [*trustees*] joint executors of his said will. *And* the said testator signed, sealed, published and declared his said last will and testament, in the presence of three competent witnesses, who subscribed their respective

when the youngest child attained 21, to be conveyed to the children as tenants in common;

with benefit of survivorship, if any died before time of vesting, without issue:

and if only one child, then the whole to that one,

subject to 200*l.* for testator's sisters,

with several other limitations, if all his children died without issue.

appointment of executors:

execution of will:

(*b*) This is a very informal clause, for it does not state how the trustees are to raise the money.

CONFIRMATION, RELEASE IN FEE, AND ASSIGNMENT ON TRUSTS FOR SALE.

names to the said will, in the presence of the said testator and each of other. AND WHEREAS after the execution of the said will, the said [*testator*], deceased, settled and assured the said freehold tenement and garden, with their appurtenances, situate at aforesaid, upon and for certain trusts, ends, intents, and purposes, for the benefit of the said [*widow*], and the said [*heir*], party hereto, [*the other children*], or some or one of them. AND WHEREAS in or about the latter end of the year one thousand eight hundred and the said [*testator*], deceased, purchased of [A. B] *All those* freehold lands and fields, containing acres, more or less, in, &c.; and by an interlineation (*c*) in his said will, he intended, or expressed an intention to give the last mentioned lands, hereditaments, and premises unto his said trustees, their heirs, executors, administrators, and assigns, upon the same trusts as are in the said will declared of and concerning his other lands, hereditaments, and premises; but in consequence of there not being any evidence that the said testator republished his said will after the said interlineation,

that subsequently testator settled by deed part of the premises devised:

that testator purchased other lands,

and by an interlineation in his will, intended to give them to his trustees upon the said trusts;

but there being no evidence that testator republished his

(*c*) The testator having purchased an estate, he obliterated the words "To have and to hold to them, their heirs, executors, administrators," being the last line of the first sheet of his will, and on the other side of the same sheet made a continuation of his will, by inserting the newly purchased estate, and also the above words, "to have and to hold," &c. No person was present when he made this alteration and addition.

Case and opinion on the above devise.

On a case for opinion, "whether, and how far the will, as originally made, was revoked by the obliteration and addition? The following opinion was given."

"Although a testator may alter his will by *cancelling* or *obliterating* part of it, without any subscribing or attesting witness, yet he must so cancel or alter those parts of the will *animo revocandi*. *Short* v. *Smith*, 4 East, 419. Whether the obliterated parts of this will (being the habendum) can or cannot, under the circumstances, be read as part of the will, yet on the will as it stands, (even admitting the cancellation or obliteration to be effectual) there is sufficient language in the will to carry the fee as effectually as if the habendum had remained part of the will; for the nature of the trusts require that the trustees should have the fee, so that in effect there is not any alteration in the will, either by the addition or by the cancellation."

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will, those lands descended to the heir at law: death of testator, and proof of will: preliminary recital, to heir's agreement to confirm.

the said lands, hereditaments, and premises, called [B.'s], are supposed to have descended to the said [ ], party hereto, as his heir at law, exempt from the provisions of the said will. And whereas the said testator [ ] departed this life on or about the day of , one thousand eight hundred and ; and on or about the day of , one thousand eight hundred and , the said [*three surviving executors*] duly proved the said will in the Prerogative Court of Canterbury. And whereas the said [*heir*], party hereto, being satisfied that the said [*testator*], deceased, his father, was, at the time of making and publishing his said will, of sound and disposing mind, memory, and understanding; and that the said will was signed, sealed, published, and declared by him in the presence of the said witnesses, and attested by them in the presence of the said testator; and being also desirous that the said will as originally made on the said day of , one thousand eight hundred and , and before such interlineation, should be operative and effectual, he the said [*heir*], party hereto, hath agreed to confirm the said will, on the terms that the said [*other children*] should join with him in the grant, release, and confirmation hereinafter contained.

First testatum. Confirmation of will as originally made;

Now this indenture witnesseth, that to the intent and purpose aforesaid, and in consideration of the sum of five shillings of lawful money current in Great Britain [and Ireland] to the said [*heir*], party hereto, paid by the said [*three trustees*], at or before the sealing and delivery of these presents; the receipt whereof is hereby acknowledged; and for divers other good causes and considerations the said [*heir*] (*d*), party hereto, thereunto moving, he the said heir, party hereto, *hath* ratified, confirmed, and established; *And* by these presents *doth*, for himself and his heirs, in all things ratify, confirm, and establish The said recited will of the said [*testator*], deceased; and all the devises, bequests, and limitations, directions, and appointments thereby made, or therein contained, according to the purport, true intent, and meaning

FINE.

(*d*) If the heir at law has a wife, she should join with him in a fine of the lands.

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thereof, as the same was originally made as hereinbefore in part recited on the said day of , one thousand eight hundred and ; *But* not in anywise the intended devise of the said estate purchased of [A. B.], which they the said [*all the other children*] do, and each of them doth hereby admit and acknowledge descended and came to the said [*heir*], party hereto, as the heir at law of the said [*testator*], deceased, exempt from the provisions of the said will. AND THIS INDENTURE FURTHER WITNESSETH, that for the ends, intents, and purposes aforesaid, and in pursuance of the said agreement; and in consideration of five shillings of lawful money current in Great Britain [and Ireland] to each of them the said [*heir*], party hereto, [*the other children*], paid by the said [*three trustees*] at or before the sealing and delivery of these presents; the receipt whereof respectively is hereby acknowledged; and for divers other good causes and considerations, the said [*heir*], party hereto, [*the other children*] thereunto moving, *They* the said [*heir*], party hereto, [*the other children*], according to their respective shares, estates, rights, and interests in the premises, but no further or otherwise, *have*, and each and every of them *hath* granted, bargained, sold, released, and confirmed; *And* by these presents *do*, and each and every of them *doth* grant, bargain, sell, release, and confirm unto the said [*three trustees*], (in the actual possession (*e*) of the said [*three trustees*] now being by virtue of a bargain and sale thereof made to them by the said [*heir*], party hereto, [*the other children*], in consideration of five shillings paid to each of them by the said [*three trustees*], by indenture bearing date on the day next before the day of the date, and executed before the execution of these presents, for one whole year, to be computed from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession,) and to their heirs, ALL THOSE the said freehold messuage and lands at , in the said county of , with the appurtenances respectively thereunto belonging; AND ALSO ALL THOLE the said free-

but not the intended devise of the subsequently purchased lands, which all the other children admit descended to the heir at law.

Second testatum.

Release in fee, five to three.

(Reference to bargain and sale for a year.)

Parcels.

(*e*) *Vide ante*, Vol. II. 97; *ante*, 161.

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hold tenements, orchards, and garden, with the appurtenances thereto belonging, situate at , in the county of , and known by the name of : AND ALSO ALL THAT the said freehold piece of land or field heretofore purchased by the said [*testator*], deceased, of John Jones, lying and being in the said parish of ; AND ALSO ALL THAT messuage, orchard, and garden, and also a field, called close; AND ALSO an orchard, called , with the fruit trees, timber, and appurtenances thereunto belonging, situate at aforesaid;

Sweeping clause.

AND ALSO ALL and singular other the hereditaments and premises whereof or wherein the said [*testator*], deceased, or any person or persons to or for his use, or in trust for him, was, both at the time of making his said will, on the said day of , one thousand eight hundred and , and continued at the time of his decease, seised, possessed of, or interested in, or entitled to, for any estate of inheritance or freehold, and respectively situate in the said counties of and , or any of them; and which, in and by his aforesaid will, were given and devised, or were intended to be given and devised, to the said [*trustees*], their heirs and assigns: AND all and singular houses, outhouses, edifices, buildings, barns, stables, dove houses, orchards, gardens, backsides, privileges, profits, commodities, emoluments, and hereditaments whatsoever to the said messuages, lands, hereditaments, and premises hereby released, or otherwise assured, or intended so to be, belonging, or in anywise appertaining, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof: AND the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the same messuages, lands, hereditaments, and premises, and of every part thereof: AND all the estate, right, title, interest, property, claim, and demand whatsoever, at law or in equity, of them the said [*heir*], party hereto, [*the other children*] respectively, and of each and every of them, of, in, to, or out of the same messuages, lands, hereditaments, and premises, every, or any part or parcel thereof. TO HAVE AND TO HOLD the said messuages, lands, hereditaments, and premises, and all and singular other the premises hereby

General words.

Reversion, &c.

All the estate.

Habendum to the use of three trustees in fee;

released, or otherwise assured, or intended so to be, with their, and every of their rights, members, and appurtenances, unto the said [*three trustees*] and their heirs (*f*): To THE USE of the said [*three trustees*], their heirs and assigns: *Nevertheless*, UPON THE TRUSTS, and for the ends, intents, and purposes, and subject to the several provisoes, declarations, and agreements hereinafter expressed, declared, and contained, or referred to, of and concerning the same. AND THIS INDENTURE FURTHER WITNESSETH, that for the considerations aforesaid, *They* the said [*heir*],

CONFIRMATION, RELEASE IN FEE, AND ASSIGNMENT ON TRUSTS FOR SALE.

upon trusts hereinafter declared.

Third testatum.

(*f*) ON USES AND TRUSTS.

On uses and trusts.

I. *What uses are executed into legal estates by the statute of Uses, and what not.*

II. *On conveyances operating by transmutation of possession.*

III. *Under powers.*

IV. *On conveyances not operating by transmutation of possession.*

V. *As to rents.*

VI. *What uses are executed by the statute on devises.*

VII. *Where it is requisite the legal estate should be in the trustees.*

1st. *In devises:*

2nd. *In deeds.*

VIII. *Where in the person beneficially interested.*

IX. *Estates for years are not within the statute, and therefore not executed, unless created anew.*

X. *Copyholds, for the same reason, are not executed.*

The statute of Uses, 27 Hen. VIII. has the following words concerning the execution of the Use:

How by the common law lands ought to be transferred from one person to another.

"Where by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made *bonâ fide*, without covin or fraud; yet nevertheless divers and sundry imaginations, subtle inventions and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents, and trusts; and also by wills and testaments, sometime made by *nude parolx* and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with

Several inconveniences ensuing by conveyance of

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party hereto, [*the other children*], *have*, and each and every of them *hath* granted, bargained, sold, and assigned; *And* by these presents *do*, and each and every of them *doth* grant, bargain, sell, and assign unto the said [*three trustees*], their executors, administrators, and assigns, ALL THAT leasehold messuage or tenement, orchard and garden, heretofore , situate at aforesaid, with their appurtenances: AND all the estate, right, title, interest, benefit of renewal, term of years and time, use, trust, possession, property, profit, claim, and demand

Assignment of leaseholds for years, five to three.

Parcels: All the estate.

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lands to uses, and by the devising them by wills.

sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance; at which times they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences and trusts, divers and many heirs have been unjustly at sundry times disherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids *pur fair fitz chivalier, & pur file marier*, and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles, and duties; also men married have lost their tenancies by the curtesy, women their dowers, manifest perjuries by trial of such secret wills and uses have been committed; the king's highness hath lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffments to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords their escheats thereof; and many other inconveniences have happened, and daily do increase among the king's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm; for the extirping and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses, and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the king's highness, or any other his subjects of this realm, shall not in anywise hereafter by any means or inventions, be deceived, damaged or hurt, by reason of such trusts, uses, or confidences:" It may please the king's most royal majesty, that it may be enacted by his highness, by the assent of the lords spiritual and temporal, and the commons, in this present parliament as-

The possession of lands shall be in him or them that have the use.

whatsoever, both at law and in equity, of them the said [*heir*], party hereto, [*the other children*], of, in, to, or out of the said leasehold premises. TO HAVE AND TO HOLD the said leasehold premises, and all and singular other the premises hereby assigned, or mentioned or intended so to be, and every part and parcel thereof, with their and every of their appurtenances unto the said [*three trustees*], their executors, administrators, and assigns, henceforth, for and during the term or terms of years, and other chattel interests for which the same premises are now held under or by vir-

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Habendum to the trustees for the terms therein:

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sembled, and by the authority of the same, in manner and form following; that is to say, that where any person or persons stand or be seised or at any time hereafter shall happen to be seised, of and in any honors, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politick, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner * means whatsoever it be; that in every such case, all and every such person and persons, and bodies politick, that have or hereafter shall have any such use, confidence, or trust, in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence, or trust, in remainder or reverter, shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate, and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates as they had or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons that were, or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politick, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence, or trust, after such quality, manner, form, and condition as they had before, in or to the use, confidence or trust that was in them."

* *sic.*

II. "And be it further enacted by the authority aforesaid, That where divers and many persons be, or hereafter shall happen to be, jointly seised of and in any lands, tenements, rents, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any of them

Assurance made of divers to the use of one or some of them.

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tue of any estate or estates, interest or interests which the said testator had therein at his death: *Nevertheless*, UPON THE TRUSTS, and for the ends, intents, and purposes, and subject to the several provisoes, declarations, and agreements hereinbefore referred to, and hereinafter expressed, declared, and contained of and concerning the same; that is to say; AND *it is hereby expressly declared and agreed*, by and between the parties hereto, as far as they respectively are interested, that the said [*three trustees*], their heirs, executors, administrators, and assigns respectively,

upon the trusts hereinafter declared.

Declaration of trust of freeholds and leaseholds; namely;

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that be so jointly seised, that in every such case that those person or persons which have or hereafter shall have any such use, confidence, or trust in any such lands, tenements, rents, reversions, remainders, or hereditaments, shall from henceforth have, and be deemed and adjudged to have only to him or them that have, or hereafter shall have any such use, confidence, or trust, such estate, possession, and seisin, of and in the same lands, tenements, rents, reversions, remainders, and other hereditaments, in like nature, manner, form, condition, and course, as he or they had before in the use, confidence, or trust of the same lands, tenements, or hereditaments; saving and reserving to all and singular persons, and bodies politic, their heirs and successors, other than those person or persons which be seised, or hereafter shall be seised, of any lands, tenements, or hereditaments, to any use, confidence, or trust, all such right, title, entry, interest, possession, rents, and action, as they or any of them had, or might have had before the making of this act."

Saving of the right of strangers.

III. "And also saving to all and singular those persons, and to their heirs, which be, or hereafter shall be seised to any use, all such former right, title, entry, interest, possession, rents, customs, services, and action, as they or any of them might have had to his or their own proper use, in or to any manors, lands, tenements, rents, or hereditaments whereof they be, or hereafter shall be seised to any other use, as if this present act had never been had nor made; any thing contained in this act to the contrary notwithstanding."

Sections IV. and V. of the statute, concerning rents, are inserted *ante*, Vol. I. 603.

Sections VI., VII., and IX., concerning jointures, are inserted *ante*, Vol. II. 489.

XIV. "And be it enacted by authority aforesaid, that all and singular

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shall henceforth stand seised and be possessed of the said messuages, lands, hereditaments, and premises hereby released and assigned, or otherwise assured, or intended so to be, with their and every of their rights, members, and appurtenances, UPON TRUST that they the said [*three trustees*], and the survivors and survivor of them, his or her heirs, executors, administrators, and assigns, do and shall, from time to time, until the said [*infant child*] shall attain the age of twenty-one years, or die under that age, pay and apply the rents, profits, and proceeds of the said messuages,

Upon trust until an infant child shall attain 21, or die under, apply the rents and profits for the children's equal benefit:

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person and persons, and bodies politic, which at any time on this side the said first day of May, which shall be in the year of our Lord God 1536, shall have any estate unto them executed of and in any lands, tenements, or hereditaments, by the authority of this act, shall and may have and take the same or like advantage, benefit, voucher, aid, prayer, remedy, commodity, and profit by action, entry, condition or otherwise, to all intents, constructions, and purposes, as the person or persons seised to their use of or in any such lands, tenements, or hereditaments so executed, had, should, might, or ought to have had at the time of the execution of the estate thereof, by the authority of this act, against any other person or persons, of or for any waste, disseisin, trespass, condition broken, or any other offence, cause, or thing concerning or touching the said lands or tenements so executed by the authority of this act."

Cestui que use may take all such advantages as his feoffees might have had.

I. In all conveyances deriving their effect from the statute of uses, the seisin upon which the use arises, must be co-extensive with the use: for if lands be given to A. and B. during their lives, to the use of C.; if A. and B. die, C.'s estate is determined, for the seisin to serve the use which A. and B. had, was only for their lives, and the execution of it in C. cannot make the estate larger: Gilb. Uses, 66, 229. So if in a conveyance to A. omitting, "and his heirs," to the use of B., his heirs and assigns, the use is only executed for the life of A. When uses are to be declared on the seisin of a releasee or feoffee, the conveyance should be to him and his *heirs*, and not to him, his heirs and assigns; for, as he is only a conduit-pipe through whom the uses are to arise, his momentary seisin is not capable of being assigned, and therefore the word "assigns" is useless. So if A., tenant for life, bargain and sell, or covenant to stand seised to the use of B. in fee, B. only acquires an estate *pour auter vie*.

What uses are executed into legal estates by the statute of uses, and what not.

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and when infant shall attain 21, or die under;

general trusts for sale:

lands, hereditaments, and premises hereby released and assigned, or otherwise assured, or intended so to be, when, and as or after the same shall be received, unto and for the equal maintenance and education of the said [*heir*], party hereto, [*the other children*]: AND when and after the said [*infant child*] shall attain the age of twenty-one years, or die under that age, UPON TRUST that they the said [*three trustees*], or the survivors or survivor of them, his or her heirs, executors, administrators, or assigns, of their, his, or her own proper authority (*g*), and without

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In all conveyances operating under the statute of Uses, it is only the first use which is executed into a possession, or that draws the seisin of the feoffee or releasee to it, by virtue of the instantaneous operation of the statute; because there cannot be any use declared on that possession, which is created by the statute; or in other words, there cannot be a use upon a use. Lord Bacon's reading on the statute of Uses, 43. Tracts, 335. 2d ed. *Tyrrell's* case, Dyer, 155, a. Gilb. Uses, 161, arising from that seisin which is transferred by the statute: and if there be any ulterior use declared, it will be only an equitable estate.

The reason why there cannot be a use on a use is, that when the statute has executed the use in the first degree, it has exhausted its power, and cannot operate any further; for the words of the statute are, "where any person or persons shall be *seised* to the use, confidence, or trust of any other person or persons, &c." and therefore on a release, or any other conveyance, operating by transmutation of the possession to A., to the use of B. to the use of C.; or on a conveyance not operating by transmutation of the possession, as on a covenant by A. to stand seised to the use of B. to the use of C.; or a bargain and sale by A. to the use of B. to the use of C.; A. in each case, and not B., is seised by the rules of the common law; B. has no *seisin* whatever independently of the statute, and by giving B. that seisin, the statute is *functus officio.*

However, the doctrine that a use cannot be on a use, has been made, as Mr. Rowe very justly observes, Bac. Uses, 134, the subject of much

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(*g*) Under trusts for sale, similar to the above, the trustees can convey a good title to the purchaser without the concurrence of the beneficial owners. *Vide ante*, Vol. I. 569, (*e*).

any further consent or concurrence of the said [*heir*], party hereto, [*the other children*], or any or either of them, or any or either of their heirs, executors, administrators, or issue, as soon as conveniently may be, do and shall make sale, and absolutely dispose of the said messuages, lands, hereditaments, and premises hereby released and assigned, or otherwise assured, or intended so to be, with their and every of their rights, members, and appurtenances, either altogether and in one lot, or by parcels and in several lots, and either by public auction or private contract, or partly

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intemperate, though impotent censure, by Mr. Watkins, Princ. Conv. Introduc. xi. xii. 2d ed.

The rule may be thus exemplified, for the purpose of shewing *what uses are, and what uses are not executed by the statute.*

II. If upon those conveyances, operating by transmutation of possession; Noy's Tenures, 95; *viz.* a fine, recovery, feoffment, lease at common law, or bargain and sale for a year, [or years,] and a release in enlargement, the use to be declared on the seisin of A. the conuzee, demandant or recoverer, feoffee, or releasee, to the use of A.; or unto and to the use of A.; he is in by the common law, and not by the statute. *Samme's* case, 13 Co. 56; *Long* v. *Buckeridge*, 1 Str. 106, 111; *Gwam and Ward* v. *Roe*, 1 Salk. 90; Gilb. Rep. 16, 17; 2 Cas. and Opin. 281. The reason of which is, that whenever an estate may take effect either by the rules of the common law, or by the statute of Uses, the common law is preferred: and notwithstanding A. is in by the common law, and the use limited to him is so far of no effect, yet that intervening use prevents the statute attaching on any ulterior use; and so far it has effect, that if in either of the above cases, a use in the second degree had been limited to B. he would have taken only an equitable estate. *Girland* v. *Sharp*, Cro. Eliz. 382; *Attorney-General* v. *Scott*, Cas. Temp. Talb. 139. So also, if on the seisin of A. the use be declared to B. to the use of C., the use to B. is executed into legal estate, and the use to C. gives him only an equitable estate. So if on the seisin of A., the use be declared to the use of A., or unto and to the use of A., or to the use of B., *to the uses*, intents, &c. hereinafter mentioned, these uses in the second degree will be mere trusts; and if these ulterior uses contain a power to appoint the lands, the appointee under such a power will only have an equitable estate. So

On conveyances operating by transmutation of possession.

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by public auction and partly by private contract, as they he, or she, in their, his, or her discretion, shall think fit, with full liberty, if they or he should think fit and requisite, to buy in the said hereditaments, or any part or parts thereof, and to rescind any contract or contracts for sale thereof, or any part or parts thereof, and resell the same at any future auction, or by private contract, with such liberty as last mentioned, without being liable to answer for any loss or diminution in price by such resale, and con-

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where A. made a settlement by deed and fine, to the use of himself and his heirs until his then intended marriage, and afterwards to the use of his wife for life, and after her death *to the use* of the cognizees in the fine, and their heirs during the life of A. upon trust to permit him to receive and take the rents and profits, remainder to the first and other sons of the marriage, &c.; remainder to the use of the heirs of the body of A.; it was adjudged by the whole court that A. took only a trust estate for life, because the use to him could not execute upon the use which was limited to the trustees for his life; and consequently the legal estate for his life was executed in them by the statute of uses, and that the limitation to the heirs of the body of A. was a contingent remainder, and such as the heir would take by purchase, and not by descent. *Tippin* v. *Cosin*, Carth. 272; Comb. 312, 313; 1 Lord Raym. 33; 4 Mod. 380. [The same principles were recognized in the late case of *Lloyd* v. *Passingham*, 6 Barn. & Cress. 305. See also *Attorney-General* v. *Scott*, Cas. *temp.* Talb. 138.] So where the uses of a fine were declared to the use of the husband for life, remainder to the use of trustees and their heirs for the life of the husband, in trust to support contingent remainders, remainder to the use of the wife for life, remainder to the use of the trustees and their heirs (omitting for the life of the wife) in trust to support the contingent uses and estates thereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions, as occasion should require, but nevertheless to permit the wife and her assigns to receive the rents, &c.; and after the several deceases of husband and wife, *to the use* of the first and other sons of the marriage in tail, &c. remainder to such uses as the wife should appoint, remainder to the use of the right heirs of the wife in fee: the use to the trustees subsequent to the estate for life of the wife being in fee, all the ulterior uses were mere trusts. *Venables* v. *Morris*, 7 Durnf. & East, 342.

III. As estates created under *powers* deriving their effect from the

vey the same hereditaments and premises, when sold, to the person or persons who shall agree to become the purchaser or purchasers thereof, and his, her, or their heirs, executors, administrators or assigns; or to such uses, and upon such trusts, as such purchaser or purchasers, his, her, or their heirs, executors, administrators, or assigns shall direct or appoint. AND UPON THIS FURTHER TRUST, that they the said [*three trustees*], and the survivors and survivor of them, and the heirs, executors, administrators, and assigns of such survivor, do and shall, by, with, and out of the clear rents, issues, and profits of the said here-

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and out of rents before sale and purchase monies,

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statute of uses, are uses arising from the seisin of the feoffees, releasees, &c. in the conveyances giving the powers, and are to be construed in the same manner as if the estates created under the powers, were limited by or contained in the conveyances giving the power; therefore such an appointment to A. to the use of B. executes the use in A. giving him the legal possession under the statute, and B. has only an equitable estate. But under an authority deriving its effect from the principles of the common law, where the donee of the power has no seisin of the estates, as in the case of a bargain and sale, under a bare power to executors to sell, where the estate is not devised to them, and the inheritance descends to the heir; Noy's Maxims, 229, (*c*); Co. Litt. 113, a; or under a bargain and sale by the Remembrancer of the Court of Exchequer, of land extended for a crown debt, by virtue of 25 Geo. III. c. 35; or a bargain and sale under the land-tax acts, in each of which cases the bargainee has a common law seisin, and a use may be declared on it, which will be executed into a legal possession by the statute of uses. Sug. Pow. 1, 196, 2d ed. [207, 4th ed.] Sug. Gilb. Uses, 351.

Under powers.

Some conveyances operate partly by the rules of the common law, and partly by the statute of Uses: as for example, the usual limitation to prevent dower, on the seisin of A. the purchaser, to the use of such person, &c. as A. shall appoint; and in default of appointment to A. for life, remainder to B. the trustee, and his heirs, during A.'s life, in trust for A., remainder to A. in fee: A.'s estate for life, and the fee limited to him in default of appointment, take effect by the rules of the common law, independently of the statute; but the limitation to B. is executed by the statute, and the ulterior trust for the life of A. is neither affected by the common law, nor by the statute, but is a Chancery

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ditaments and premises hereby released and assigned, or otherwise assured, or intended so to be, which shall become due after the said [*infant child*] shall have attained the age of twenty-one years, or have departed this life under that age, and shall be received by them and him respectively; and also the money which shall arise by or from such sale or sales respectively, in the first place deduct and retain to and for themselves, himself, and herself respectively, the costs, charges, and expenses of and attending the execution of the trusts

to retain expenses attending the trusts:

[or rather an equity] trust; and so also when A. exercises his power of appointment, the appointee is in by the statute under the learning of shifting uses. The reasons why A. cannot be seised to the use of himself, are, because a man could not be a trustee for himself before the statute of uses; and the words of the statute are, "where any person or persons shall be *seised* to the use, confidence, or trust of any *other* person or persons, &c.:" and Lord Bacon says, the whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate; therefore, he adds, the statute ought to be expounded, that where the party seised to the use, and the *cestui que use* is one person, he never takes by the statute, *except* there be a direct impossibility or impertinency for the use, to take effect by the common law. Bacon on Uses, 63; Law Tracts, 352, 2d ed. As if A. enfeoff B. in fee to the use of B. in tail, and then to the use of C. in fee; or if A. covenant to stand seised to the use of himself in tail, and to the use of his wife in fee; in both these cases the estate tail is executed by the statute; *first*, in favor of the issue in tail, *Samme's* case, 13 Co. 56; and, *secondly*, because an estate tail cannot be reoccupied out of a fee simple, being a new estate, unknown to the common law, created by the statute *de donis*, and not like a particular common law estate for life or years, which are but portions of the absolute fee, and are disposable by the owner in like manner, without any restriction. But if A. enfeoff B. in fee, to the use of C. for life, and then to the use of B. in fee, B. is in of the fee simple, merely in course of possession, and as of a reversion, and not of a remainder. Co. Litt. 22, b.: but Lord Bacon says, the law would be contrary, if A. enfeoff B. in fee to the use of C. for life, then to the use of B. for life, with remainder to the use of D. in fee; as the law will not admit fraction of estates, B. is in with the rest by the statute. Bacon on Uses,

hereby reposed in them, him, and her, and the money which they, he, and she respectively shall disburse for taxes and repairs, or insurance, if any shall be made of the buildings of the said premises against loss or damage by fire; or in or about any suit or suits at law or in equity, for obtaining the possession of the premises, or any of them, or carrying the trusts hereby reposed in them, him, or her into execution, and enforcing the performance of any contract or contracts, with any person or persons who shall agree to become the purchaser or purchasers of the

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64; Law Tracts, 353, 2d ed. However, the last proposition is questionable, and it is contrary to his Lordship's reasoning in the preceding page.

So where A. by lease and release conveyed lands to C. and D. and their heirs, to hold to them, their heirs and assigns, as tenants in common, and not as joint-tenants, to the only proper and absolute use and behoof of them, their heirs and assigns for ever: counsel made a point, that although the seisin was in common, yet the use being to them as joint-tenants, whatever interest passed by the release survived to D., and no part descended under the release to the defendants, the heirs of C.: but at a future day, time having been given him to consider this point, he admitted that C. and D. took as tenants in common, although, if it had been a use executed by the statute, the consequence would be, that they were joint tenants, yet he admitted, that where the person seised to the use and *cestui que use*, is the same, the statute does not operate. And for this he cited Lord Bacon, *ut supra*. Wherefore judgment passed for the defendants. *Doe* ex dem. *Hutchinson* v. *Prestwidge*, 4 Maule and Selw. 178. This was certainly admitting the principle to a great extent, and it seems that there was ample room for argument.

IV. On conveyances not operating by transmutation of possession, *viz.* a covenant to stand seised, or a bargain and sale under the statute, the uses are fed by the seisin of the covenantor or bargainor, and the covenantee or bargainee has only a use, which is immediately executed into a legal estate by the statute; and therefore any ulterior use will not be executed: as for example, if A. covenant to stand seised to the use of B., to the use of C., or bargain and sell to B. to the use of C., the use to B. only is executed by the statute, and the use to C. is a

On conveyances not operating by transmutation of possession.

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and pay the residue among such of the children as shall be living when the infant attains 21, or dies under;

said messuages, lands, hereditaments, and premises hereby released and assigned, or otherwise assured, or intended so to be, or any of them: *And then* UPON TRUST, to pay the residue or surplus of the money arising from the said rents and profits, and also from the sale of the said messuages, lands, hereditaments, and premises, and which shall from time to time remain in their, his, or her hands, unapplied to any of the purposes aforesaid, unto the said [*heir*], party hereto, [*the other children*], or such one or more of them as shall be living when the said [*infant child*]

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trust estate. *Tyrrel's* case, Dyer, 155, a; Shep. Touch. 225, 508; 7 Bac. Abr. 121, Uses (H.), 1; *Ash* v. *Gallen*, Ch. Ca. 114; 22 Vin. Abr. 207, pl. 14.

As to rents.

V. Before the statute, a rent newly created might be bargained and sold; because when the money, as an equivalent, was given, and ceremonies or words of law were wanting, the Chancery supplied them; therefore this was good to pass the estate, without any words of granting.

But since the statute, a rent newly created cannot be bargained and sold, because there ought to be a freehold in some other person to be executed in *cestui que use*; but there can be no seisin of this rent in the bargainor, because no man can be seised of a rent in his own land; and consequently there can be no estate to be executed in the bargainee. *Chudleigh's* case, 1 Co. 127, a; Gilb. Uses, 86, 281, 287.

The statute has two provisions for the execution of rents:—the first, for rents *in esse* limited to uses, or created *de novo*, to uses, which are executed in the same manner as uses of corporeal hereditaments; 27 Hen. VIII. c. 10, s. 1;—the other, for rents limited in use out of the seisin in the land of some other person, *ex gratia*, where any person stands seised of any lands, to the use that some other person may receive a rent thereout, which the statute executes in the same manner as if a sufficient grant had been made to him by the person seised to the use, and gives the *cestui que use* a power of distress. 27 Hen. VIII. c. 10. s. 4, 5; *vide ante*, Vol. I. 603. This clause, it has been held, relates as well to rents limited since the statute, as to rents then *in esse*; Dy. 362, b. pl. 21; *Danby* v. *Conyers*, 1. And. 51; Bendl. 315, pl. 299; therefore, if lands be conveyed to A. and his heirs, to the use that B. and his heirs may receive a given rent, the use will be executed by

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shall attain the age of twenty-one years, or die under that age; and the issue of such one or more of them as shall die in the mean time leaving issue who shall be then living, or who shall be then in *ventre sa mere*, and afterwards born alive, and to his, her, and their executors, administrators, and assigns, to be divided between them if more than one, so and in such manner that they may take their respective shares, as tenants in common; and so and in such proportions that the issue of different parents may take *per stirpes*, and not *per capita*; and so as no person

and the issue of such as shall die in mean time leaving issue;

to be divided between them as tenants in common *per stirpes:*

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the statute. Sug. Gilb. Uses, 193. But if lands are conveyed to A. and his heirs, to the use, intent, and purpose that B. and his heirs may receive a rent, with a declaration, that B. and his heirs shall stand seised of the rent, to the use of C. for life, with remainder over; the rent is executed in B. and then C. and the remainder-men take only the trust of the rent. *Chaplin* v. *Chaplin*, 3 P. Wms. 229, 231; Butl. n. Co. Litt. 271, b. III. 4. *ad fin.* Where the learned annotator says, "if the estate be conveyed to A. and his heirs, to the use that B. may receive a rent for life; and after his decease, to the use that his first and other sons successively, and the heirs of their respective bodies may receive the rent; these, *it may be contended*, are distinct rents; and therefore the rent to the second son *may be considered* too remote; as being a new rent limited to take effect after an indefinite failure of the issue of the first son. Objections also *may be made* to recoveries suffered by the father and son, as the tenant to the *præcipe* being made by the father, he will not be seised of that rent in which the son's intail subsists. The way, therefore, to limit the rent is, to grant a rent to a stranger and his heirs, that he may re-grant them to the intended uses." And see Butl. n. Fearne's Remainders, 529. The above doubts seem to have been founded on Lord Hardwicke's observations, in *Whitfield* v. *Fausset*, 1 Ves. sen. 390-1. But as the limitations of the use of the rent in that case are not clearly stated, and as his Lordship inclined to the opinion that it was but one rent, the correctness of the above doubts is extremely questionable. However, those doubts may be avoided without resorting to a grant and re-grant. For the grant of a rent-charge *de novo* to uses is within the first section of the statute; Bac. Uses, 43; and see I Sand. on Uses, 101, 3d ed. [108, 4th ed.] Indeed, the learned annotator, in another place says, "if it is intended to limit a rent in strict settlement, it is necessary to do it by way of grant at common law to some person and his heirs, to the uses intended to be limited.

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the freehold lands to be discharged from the character of being real estate, and to be considered as personal.

or persons may take under the description of issue, unless his, her, or their parent shall have departed this life before the said [*infant child*] shall attain the age of twenty-one years, or die under that age; and so that the said freehold messuages, lands, hereditaments, and premises may, as between the said [*heir*], party hereto, [*the other children*], and their respective issue, and their respective heirs, executors, and administrators, be fully and completely discharged from it's character of being real estate, and be, and be considered as converted into personal estate: and the

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This gives the grantee the mere seisin to the uses, and the uses declared upon it will be executed by the statute." Butl. n. Co. Litt. 298. a, *ad fin.* Mr. Sugden expresses the same point in these words, "the rent may be granted to a stranger to the uses at once;" see *Bascawen* v. *Cook*, 1 Mod. 223; *Cook* v. *Herle*, 2 Mod. 138, S. C.; although if limited by way of use to the stranger, the ulterior intended uses would be mere trusts; see *Chaplin* v. *Chaplin*, 3 P. Wms. 229. Sug. Gilb. Uses, 193.

What uses are executed by the statute on devises.

VI. The same doctrine extends to *devises:* therefore a devise to A. to the use of A., in trust for B., or unto and to the use of A., in trust for B., gives A. the legal estate, and B. an equitable estate only. *Robinson* v. *Comyns*, Cas. Temp. Talb. 164. [*Harris* v. *Pugh*, 4 Bing. 385.]

So a devise to A. and his heirs, to the use of B. and his heirs, would give the legal fee to B. But if the testator's intention cannot take effect under the statute of uses, the law will leave its effect to the statute of wills. Thus if a devise be made to the use of A. for life, with remainders over, if it were considered as a limitation under the statute of uses, it would be void for want of a seisin to serve the uses. Butl. n. Co. Litt. 271, b. (1) III. 5. So if a devise be to A. and his heirs, to the use of B. and his heirs, and A. die in the testator's life-time, perhaps the courts would, in favour of the intention, construe the devise as a disposition not affected by the statute of uses, but as giving the fee to B. at once. But even admitting that the devise would be void at law, yet equity would compel the testator's heir to fulfil the intention, by conveying the estate to the same uses. Sug. Pow. 133, 2d ed. But whether a devise to uses operates solely by the statute of wills; 1 Collectanea Juridica, 427; or by that statute jointly with the statute of uses, is, except in a very few cases, a matter rather of spe-

share or shares of each such issue, being an infant, to be paid to his or her guardian or guardians for the time being, for his or her use. And *it is hereby declared and agreed* by and between the parties to these presents, as far as they respectively are interested, and they the said [*heir*], party hereto, [*the other children*], for themselves respectively, and their respective heirs, executors, administrators, and assigns, do, and each and every of them doth hereby direct and appoint, that the person or persons respectively who shall become the purchaser or purchasers of the said

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Purchaser's indemnity clause.

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culation than of use; 2 Fonbl. Treat. of Eq. 24, 5th edit. as it is now settled that an immediate devise to uses, without a seisin to serve those uses, is good; and that where the estate is devised to one for the benefit of another, the courts execute the use in the first or second devisee, as appears to suit best with the intention of the testator. Butl. n. *ubi supra*. See further, Powell on Devises, 272. 1 Saud. Uses, 203, 3d edit. 195, 2d edit. [241, 4th ed.] Gilb. Uses, 162, 281. Sug. edit. 356, 486. 1 Cru. Dig. 436, 2d edit. The subject is interesting, and sometimes leads to important results.

VII. 1. Independently of the rule that a use cannot be on a use, wherever something is to be done by the trustees, which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes, and keep the premises in repair, or where their approbation is necessary to the receipt of the rents and profits by a tenant for life, or the like, the legal estate is vested in them, and the person beneficially interested has only a trust estate: and this distinction has prevailed ever since the 36 Hen. VIII. when the judges delivered an opinion, that where a man made a feoffment in fee, to the use of the feoffor for life, and after his decease that A. *should take the profits*, the use was executed in A.; but on the contrary, if he said that after his death the feoffees should receive the profits, and pay them to A., the use would not be executed in A., because he could only have the profits by the hands of the feoffees. Bro. Abr. *Feffements al Uses*, pl. 52. Wms. n. 2 Saund. 11, c. and see *Kenrick* v. *Beauclerk*, 3 Bos. and Pul. 178. As where lands were *devised* to trustees and their heirs *in trust* for a married woman and her heirs, and that the trustees should from time to time pay and dispose of the rents and profits to A., or to such person or persons as she by

Where it is requisite, the legal estate should be in the trustees.

1st. In devises.

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messuages, lands, hereditaments, and premises hereby released and assigned, or otherwise assured, or intended so to be, his, her, or their heirs, executors, or administrators, shall not be obliged or required to see the application of the money to be advanced or paid by him, her, or them respectively, as the consideration of such purchase or purchases; nor be answerable or accountable for the misapplication or non-application of the same money, or any part thereof, after the same shall have been paid to, or to the order of, or under the direction of the said trustees, or the

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any writing under her hand, as well during coverture, as being sole, should order or appoint, without the intermeddling of her husband, whom the testator willed should have no benefit or disposal thereof; and as to the inheritance of the premises *in trust* for such person or persons, and for such estate and estates as A. by any writing purporting to be her will, or other writing under her hand, should appoint; and for want of such appointment, *in trust* for her and her heirs; the question was, whether this was a use executed by the statute, or a bare trust for A.: and the court held it to be a trust only, and not a use executed by the statute. *Nevil* v. *Saunders*, 1 Vern. 115. So where lands were devised to trustees and their heirs, in trust, after payment out of the rents and profits of several legacies, annuities, and the trustees costs and charges, to *pay* all the residue of the rents and profits to A., a married woman, during her life, *for her separate use*, or as she should direct, and after her death the trustees to *stand seised to the use* of the heirs of her body severally and successively as they should happen to be in priority of birth and seniority of age, and to the heirs of their respective bodies in tail general, subject to the payment of the several annuities and legacies, with remainders over to the plaintiff. A. and her husband levied a fine, and suffered a recovery of the premises, and died without issue, under whom the defendant claimed the estate. Lord King was of opinion, that by the words of the will the use was executed in the trustees and their heirs during the life of A., and that she had only a trust in the surplus of the rents and profits, after payment of the annuities during her life; but that by the subsequent words, "that the trustees should stand seised to the use of the heirs of the body of A., &c." the use was executed in the persons entitled to take by virtue thereof, chargeable with the payment of the annuities; and therefore there being only a trust estate in the ancestor, and a use executed in the heirs of her body, those different interests

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survivors or survivor of them, his or her heirs, executors, administrators, or assigns: AND that every receipt which shall be given by the said [*three trustees*], and the survivors and survivor of them, his or her heirs, executors, administrators, or assigns, for such purchase money, or any part thereof, shall be a good, valid, and sufficient acquittance and discharge for the sum or sums of money which therein or thereby respectively shall be acknowledged or expressed to be or to have been received: AND that every sale which shall be made, and contract for sale which shall

Trustees' receipts to be be sufficient.

Trustees' contracts and conveyance to be

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could not unite so as to create an estate-tail, by operation of law in the ancestor, under the rule in *Shelley's* case, 1 Co. 93, that where the estate limited to the ancestor, is merely an equitable or trust estate, and that to his heirs, &c. carries the legal estate, they will not incorporate into an estate of inheritance in the ancestor; as (in general) would have been the case, if they had been both of one quality, that is, both legal, or both equitable. Butl. Fearne, 52, 3d ed. 34. *Lady Jones* v. *Lord Say and Sele*, 8 Vin. Abr. 262, pl. 19. [And see *Doe dem. Pratt* v. *Timins*, 1 B. & A. 530.] And the rather in this case, his Lordship added, because it was limited to the heirs of her body severally and successively, as they should be in seniority of age and priority of birth, and the heirs of their respective bodies issuing: and he said there was a difference between this case and *Broughton* v. *Langley*, 2 Salk. 679; for there it was to *permit* A. to *receive* the rents and profits for life; but here it is a trust in the trustees, to *pay over* the rents and profits to such and such persons; and therefore the estate must remain in them to answer these trusts; otherwise she must be the trustee, contrary to the express words of the will: and he decreed accordingly for the plaintiff. And this decree was affirmed in the House of Lords. 1 Eq. Ca. Abr. 383, pl. 4; 3 Bro. Parl. Cas. 113. It seems difficult to understand how the use could in this case be executed in the heirs of her body, because no person can have an heir until his death, and she died without issue. The counsel for the respondents made a more rational construction, when they said, it appeared to have been the intention of the devisor, that after the death of A. a legal estate tail should vest in the heirs of her body, as purchasers, and not by descent. 3 Bro. Parl. Cas. 118. In which case, the uses in remainder would have been executed *sub modo* only, until the death of A. and then have been liable to be anticipated in enjoyment, by the contingent use in tail, arising to A.'s heirs in the event

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binding on persons beneficially interested.

Trustees' indemnity clause.

be entered into, and conveyance which shall be executed by the said [*three trustees*], and the survivors and survivor of them, his or her heirs, executors, administrators, or assigns, shall be binding and conclusive on the said [*heir*], party hereto, [*the other children*] respectively, and their respective heirs, executors, administrators, and assigns, and every of them. PROVIDED ALWAYS, *and it is hereby declared and agreed* by and between the parties to these presents, as far as they respectively are interested, that the said [*three trustees*], and each and every of them, and the

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of her leaving heirs of her body. But even that construction cannot be supported, as it seems clear, that the use could not execute either in the issue, if there had been any, or in those in remainder, because the trust, for payment of the legacies and annuities, required that the trustees should have the legal estate, to enable them to execute that trust; Butl. Fearne, 54; and therefore it seems, that under the rule in *Shelly's* case, as the estate for life to A. and the limitation to the heirs of her body, were both equitable estates, they united, and she became equitable tenant in tail. Butl. Fearne's Rem. 56, 4th ed. 74. And consequently the estate tail and the remainders over, being both equitable estates *executed*, they were barred, by the equitable recovery which she suffered. Fearne's Posthumous Works, 333. And see *White* v. *Carter*, Ambl. 670; 2 Eden, 366. S. C. Fearne's Rem. 55. 183, Butl. ed. And where a devise was made to trustees and their heirs upon trust, to permit and suffer a married woman to receive and take the rents and profits during her life, *for her own sole and separate use*, notwithstanding her coverture, *and without being in anywise subject to the debts, management, power, or controul of her then or after-taken husband*, and her receipt alone to be a sufficient discharge, with remainder to her first and other sons in tail; it was held, that the legal estate was vested in the trustees, because it being the intention of the testator to secure to the feme covert a separate allowance, free from the control of her husband, it was essentially necessary to effectuate that intention, that the trustees should take the estate with the use executed in themselves, otherwise the husband would be entitled to receive the profits, and so defeat the very object the devisor had in view. *Harton* v. *Harton*, 7 Durnf. & East, 652. And see also *Reid* v. *Shergold*, 10 Ves. 377. Sir James Mansfield, 2 Taunt. 111, says, he always understood the decision in *Jones* v. *Say and Sele*, to have gone on the same

heirs, executors, administrators, and assigns of them, and each and every of them, shall be charged and chargeable only for such monies as they respectively shall actually receive by virtue of the trusts hereby reposed in them, notwithstanding, his, her, or their, or any or either of their giving or signing, or joining in giving or signing any receipt or receipts, for the sake of conformity: And that neither of them, his, her, or their heirs, executors, administrators, or assigns, shall be answerable or accountable for any banker or other person with whom, or in whose hands any

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ground, that it was the case of a feme covert, and was so held in order to protect her. So where lands were devised to trustees and their heirs in trust, that they should, out of the rents and profits, or by sale or mortgage of the whole, or so much of the estate as should be necessary, raise a sum sufficient to pay the testator's debts and legacies, and afterwards in trust and to the use of A. for life, with several remainders over; the question was, whether the legal estate vested in the trustees: Lord Hardwicke was of opinion, that the devise to the trustees and their heirs carried the *whole fee* in point of law to them, and therefore the estate for life, as well as the estates in remainder, were merely trust estates in equity; that part of the trust was to sell the whole, or a sufficient part of the estate for the payment of debts and legacies; which would carry a fee by construction, had the word *heirs* been omitted in the devise, as in *Shaw* v. *Weigh*, 1 Eq. Cas. Abr. 184; [Fearne's Rem. 284, 3d ed. 356-7, Butl. ed.:] for the trustees must have a fee in the whole estate, to enable them to sell; because, it being uncertain what they may sell, no purchaser could otherwise be safe; that the only doubt he had was on the case of *Lord Say and Sele* v. *Lady Jones*; but on examination that case differed in a material point; and taking together all the clauses of that will, it amounted only to a devise to trustees, and their heirs, during another's life, upon which a legal remainder might be properly limited: but in the present case, the whole fee being in the trustees, a remainder of the legal estate could not be limited to A. *Bagshaw* v. *Spencer*, 1 Ves. 143; 2 Atk. 246, 570; 1 Collectanea Juridica, 382. So where lands were devised to trustees and their heirs, upon trust yearly, by equal quarterly payments, by and out of the rents and profits of the premises, after deducting rates, taxes, repairs, and expenses, to *pay* such clear sum as should then remain to A. and his assigns, for his life; and from and

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part of the said trust monies shall or may be deposited or lodged for safe custody, or otherwise, in the execution of the trusts hereinbefore contained: AND that they, or any or either of them, shall not be answerable or accountable for any misfortune, loss, or damage which may happen in the execution of the aforesaid trusts, or in relation thereto, except the same shall happen by or through his, her, or their own wilful default respectively; and then and in that case each person respectively shall singly and alone be answerable for such loss or damage as shall arise from his or

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after his decease, *to the use* and behoof of the heirs male of the body of A. as they should be in priority of birth; with remainder over in default of such issue. Lord Thurlow held, that the trustees being to pay the taxes, repairs, &c. must have an interest in the premises; that, therefore, the legal estate for the life of A. was in them, and he had only an equitable estate for life, *and the subsequent estate being executed, he had an equitable estate for life, and a legal remainder in tail,* [it is difficult to understand how A. could have a remainder in tail when his heirs took by purchase. *Quære,* omit the words in italics, and read those afterwards in crotchets] which could not unite, [with the legal remainder in tail to his heirs male;] and of course, there could not be a good tenant to the *præcipe,* and the recovery suffered by A. was void. It being necessary, in order to make a good tenant to the *præcipe,* that there should be a legal estate for life, with a legal reversion in tail, or an equitable estate for life, with an equitable reversion in tail. *Shapland* v. *Smith,* 1 Bro. C. C. 75; Fearne's Posthumous Works, 421; 2 Cox, 145. See also *Robinson* v. *Grey,* 9 East, 1; *Chapman* v. *Blissett,* Cas. Temp. Talb. 150. So where the testator devised, unto his friends and trustees, W. L. and J. L. his several houses therein described, and also all his monies in the public funds or otherwise, which he should die possessed of, to hold to them his said trustees, to and for the intents and purposes thereinafter mentioned, *viz.*: upon trust to permit and suffer his the testator's wife, to have, hold, use, occupy, possess, and enjoy the full, free, and uninterrupted possession and use of all and singular the interests of the said monies in the funds, or otherwise, and rents and profits arising from the said houses, for and during the term of her natural life, if she should continue his widow, and unmarried; and that her receipts for all rents, interests, profits, *with the approbation of any one of his said trustees*

her own default: AND ALSO that it shall and may be lawful to and for the said [*three trustees*] respectively, and their respective heirs, executors, administrators, and assigns, and each and every of them, by and out of the monies which shall come to his, her, and their respective hands, by virtue of the trusts aforesaid, to deduct, retain, and reimburse to and for himself and themselves respectively, all costs, charges, damages, expenses, and fees to counsel for advice, which he, she, they, or any of them shall or may suffer, sustain, expend, disburse, lay out, be

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Power to trustees to reimburse themselves their expenses.

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should be good and valid, she his said wife providing for, and educating properly all the (five) children (therein named) which the testator then had; and also paying Mrs. M. D. thereout of his said estates one annuity of 20*l.* half yearly, to whom the testator bequeathed the same during her natural life, and likewise paying to Miss M. J., besides board and lodging, one other like annuity of 20*l.* half yearly, to whom the testator also bequeathed the same. The question was, whether, on the true construction of the above devise, the use was executed in the widow, under the statute of uses, giving her the legal estate, so as to enable her to make a distress for rent. At the assizes, Heath J. thought that no doubt a simple devise to trustees to suffer any one to enjoy rents and profits was a use executed in the *cestui que trust*, unless there is any thing to be done by the trustee: but in this case there were receipts to be approved and annuities to be paid. He therefore thought that as there was something to be done by the devisees, the use was not executed in the widow, and under his direction the jury found a verdict accordingly. On a motion for a new trial, Chambre J. said, in this case the legal estate is in the trustees: to determine that, we must look to the intent of the will; and it seems pretty clear that intent was not to give the widow the legal estate. It is true, there is very little left for the trustees to do during her widowhood, but if it was intended that she should have the legal estate, there would have been no need of any trustees at all. The testator making the approbation of the trustees necessary to her receipts, I think, shews it was not intended to give the widow a legal estate. Gibbs J. The rule has been misconceived. Though an estate be devised to A. and his heirs, to the use of B. and his heirs, the courts will not hold it to be a use executed, unless it appears by the whole will to be the testator's intent that it should be executed. The courts will rather say, the use is

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Partial power of pre-emption to heir.

at, or be put into, in or about the execution of the aforesaid trusts, or in relation thereunto (*h*). PROVIDED ALWAYS, *and it is hereby declared and agreed* by and between the said parties to these presents, as far as they respectively are interested, that the said [*heir*], party hereto, shall, on giving notice of his intention in writing to the said [*three trustees*], or the survivors or survivor of them, his or her heirs, executors, administrators, or assigns, within ten days after the said [*infant child*] shall attain the age of twenty-one years, or die under that age, which shall first happen, have the

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not executed, because the approbation of a trustee is made necessary; than that the approbation of a trustee is not necessary, because the use is executed. The very circumstance which is to discharge the tenants, is the approbation of one of the trustees: "I leave my wife to receive the rents, provided there is always the control of one of the trustees upon her receipts." The testator, therefore, certainly meant that some control should be exercised, and what could that control be, except they were to exercise it in the character of trustees? I agree, therefore, that the legal estate is in the trustees. *Gregory* v. *Henderson*, 4 Taunt. 772.

2dly. In deeds.

VII. 2d. The same principle of construction is equally applicable to *deeds:* thus, where A., tenant for life, remainder to B. his son in tail; reversion to A. in fee, conveyed lands to trustees, and levied a fine of estates in L. and N. to the use of the trustees and their heirs, in trust, with the consent in writing of A., A.'s wife, and B. or the survivor of them, and of an incumbrancer, to sell the estates in fee, and apply the money arising by sale of the N. estates, in discharging debts, redeeming annuities, &c. and stand possessed of the money arising by sale of the L. estate, upon trust to invest the same with the approbation of A., A's wife, and B. in the purchase of other lands in fee, to be settled to uses for their benefit: with a proviso, that the *rents, issues, and profits* of the L. estate should, *until sale of the inheritance, be received by such person and for such uses as the same rents, &c. would have been if these presents had not been made and no fines levied:* it was held, that

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POWER TO APPOINT NEW TRUSTEES.

(*h*) As the trusts would necessarily soon terminate in the above instance, and as three trustees were appointed, the usual clause for appointing new trustees was omitted.

option, and be entitled to a preference of purchasing the freehold and inheritance of the said messuage and lands in aforesaid; together with all coppers, grates, shelves, cupboards, and actual fixtures, dressers, shelves, doors, and partitions belonging thereto, upon the terms of agreeing to pay and actually securing to the trustees or trustee for the time being of these presents the payment for the same within three calendar months after the said [*infant child*] shall attain the age of twenty-one years, or die under that age, the price or sum of thousand

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the use of the L. estate was immediately executed in the trustees, even before any consent given for the sale of it by A., &c.: that the proviso, that the rents, &c. should be received by such person, &c. was nothing more than the common provision in such cases, for the perception of the rents and profits, by the persons beneficially entitled at the time of the conveyance, until the sale should be made, and by no means carried the legal estate to such persons. *Keene* v. *Deardon*, 8 East, 248, 263.

Where it is requisite, the legal estate should be in the person beneficially interested.

VIII. In general, it has been shewn the distinction is, that where the limitation to trustees and their heirs is *in trust to receive the rents and profits and pay them over to* A. for life, &c. this use to A. is not executed by the statute, but the legal estate is vested in the trustees to enable them to perform the will; but where the limitation is to trustees and their heirs in trust, *to permit and suffer* A. *to receive* the rents and profits for his life, &c. the use is executed in A. unless it be necessary that the use should be executed in the trustees to enable them to perform the trust. As where lands were devised to trustees and their heirs, and the testator declared that the trustees and their heirs should stand seised of the lands, to the uses, intents, and purposes thereinafter mentioned, that is to say, to the intent and purpose, to permit and suffer A. to *receive and take* the rents and profits for and during the term of his life, and after his decease, should stand seised of the lands, to the use of the heirs of the body of A., remainder over; with a proviso, that A., with the consent of the trustees, might make a jointure for his wife; it was held, that this was a use executed in A., and not a trust estate, because it would have been a plain trust at common law, and what at common law was a trust of a freehold, or an inheritance, is executed by the statute, which mentions the word *trust*,

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hundred pounds sterling: *But* after the expiration of the said ten days without any option declared, or after the expiration of the said three calendar months without such payment being made, the said option shall be forfeited and cease, and be void. AND EACH AND EVERY OF THEM THE SAID [*heir*], party hereto, [*the other children*] severally, separate, and apart from the others of them, doth hereby for himself and herself respectively, and his and her respective heirs, executors, and administrators, and as to and concerning only the acts, deeds, and defaults

Covenant by each of the persons beneficially interested, restrained to separate acts and deeds.

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as well as use. And it was held, that a power to make a jointure does not necessarily exclude an estate tail; because as tenant in tail cannot make a jointure without discontinuing or barring the entail, such power has its use. And the case of *Burchett* v. *Durdant*, 2 Vent. 312, adjudged to the contrary upon the above point, was denied to be law. *Broughton* v. *Langley*, 2 Ld. Raym. 873; 2 Salk. 679. 1 Lutw. 814, 823; 1 Eq. Ca. Abr. 383, pl. 3; Fearne's Rem. 116, 3d ed.; 159, Butl. ed. And the same distinction was taken by Lord Kenyon, in the case of *Doe* on the demise of *Woolley* v. *Pickard*, Stafford Summer Assizes, 1797; and by Mr. Justice Lawrence, in *Jones* v. *Prosser*, Worcester Spring Assizes, 1798. Wms. n. 2 Saund. 12. So where lands were devised to two trustees, and the survivor of them, to hold to them and the survivor, and his heirs and assigns, upon trust to permit and suffer the testator's wife to have, receive, and take the rents, issues, and profits thereof, during her natural life, for her own absolute use and benefit, and from and after her decease, in case A. should be then living, in trust, *to pay unto, or permit and suffer A. to have, receive, and take* the rents, issues, and profits thereof, for her natural life, with remainder over: the question was, whether the legal estate was in the survivor of the devisees in trust, or in A. Mansfield C. J. I thought it had been settled by the case of *Shapland* v. *Smith*, that the distinction was abolished, unless in cases where something especial was to be done by the trustee, as to pay rates or repairs; but I find it is otherwise. It is miraculous how the distinction ever became established; for good sense requires that in both cases it should equally be a trust, and that the estate should be executed in the trustees; *for how can a man be said to permit and suffer, who has no estate, and no power to hinder the* cestui que trust *from receiving*. The court took time to consider, and on another day the Chief Justice delivered the following

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That they have not incumbered:

of himself and herself respectively, and of his and her respective heirs, executors, and administrators, covenant and agree with the said [*three trustees*], their heirs, executors, administrators, and assigns, that they the said [*heir*], party hereto, [*the other children*] respectively, have not, at any time or times heretofore, made, done, executed, committed, or willingly or knowingly suffered any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said freehold messuages, lands, hereditaments, and premises hereby released, or otherwise assured, or in-

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judgment;—This case might be argued and considered for ever, without advancing it at all in law, reason, or precedent. But as it happens, in this will, the last words are, "permit and suffer," which give the *cestui que trust* a legal estate; and the general rule is, that if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail; and consequently, for want of a better reason, we are forced to say that we think this will gives the legal estate to the party beneficially interested. *Doe*, ex dem. *Leicester* v. *Bigg*, 2 Taunt. 109. So under a devise to trustees, their heirs, &c. of freehold and leasehold estate, upon trust *to permit and suffer the testator's wife to receive and take the rents and profits until his son should attain twenty-one*, and then to the use of his son in fee; and a devise of other lands to the trustees, upon trust to receive the rents and profits till his son attained twenty-one; and in the mean time to appply the profits in discharging the interest of a bond of 3000*l.* and on his son attaining twenty-one, upon trust by sale, lease, or mortgage of the last-mentioned premises, to raise the 3000*l.*, and discharge the bond; and subject thereto, to the use of his son in fee on his attaining twenty-one: and a third devise of other lands, and the residue of his real and personal estate, to the use of the same trustees, in trust, by sale, lease, or mortgage of the same, to raise 3000*l.*, and pay it to his daughter *E.* and after payment thereof, absolutely to sell and dispose of so much of the residue of his said lands, &c. as they should think proper, to raise money to pay his debts, legacies, and funeral expenses; and then upon trust to pay the interest and produce of his real and personal estate to his then wife, for the maintenance of herself and two children till the latter should attain twenty-one, if she continued his widow; but if not, then for the benefit of the two children till twenty-one; and then to transfer to those children such residue; with further trusts if either

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and for further assurance :

tended so to be, or the said leasehold piece of land, or any part of the same respectively, shall or may be impeached, charged, incumbered, or in anywise affected in title, charge, estate, or otherwise howsoever: AND ALSO that they the said [*heir*], party hereto, [*the other children*] respectively, and their respective heirs, executors, and administrators, shall and will, from time to time, and at all times, upon any reasonable request of any person or persons entitled by virtue of these presents to any estate or interest or benefit in the said messuages, lands, heredita-

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or both of them died under twenty-one; with a proviso, that it should be lawful for the trustees, and the survivor, at any time or times, *till all* the said lands, &c. devised to them, upon trust as aforesaid, *should actually become vested in any other person or persons by virtue of the will, or until the same or any part thereof should be absolutely sold as aforesaid*, to lease *the same or any part thereof*, for any term not exceeding fourteen years, in *possession* and not in reversion, at the best rent, &c.; it was held that the devise in the first clause to the trustees, upon trust *to permit and suffer the testator's wife to receive and take the rents and profits* of the lands there described, until his son *attained* twenty-one, vested the legal estate of those lands in her, and was not affected by the subsequent leasing power given to the trustees, which, it was held, was confined to premises originally vested in them as trustees, or over which, when afterwards becoming vested in others, the trustees retained a power of sale, &c. *Right*, lessee of *Phillipps* v. *Smith*, 12 East, 455. So a devise of lands to a trustee and his heirs, to the *use* of A. and B. during their lives, and the life of the longest liver of them, without impeachment of waste: and from and after the determination of that estate, to the use of the trustee and his heirs, during the lives of A. and B. and the life of the longest liver of them, upon trust to preserve the contingent uses and estates, &c. but nevertheless to permit the said A. and B. and the survivor of them, during their lives, and the life of the longest liver of them, to receive and take the rents and profits of the said lands and premises for their own use: and from and after the several deceases of A. and B., then *in trust* for the heirs male of the body and bodies of A. and B.: and in default of such issue, then to and for the *use* and behoof of C. and his heirs. A. died without issue; B. afterwards suffered a recovery of the premises; devised them to his daughter in tail general; and died

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ments, and premises hereby released and assigned, or otherwise assured, or intended so to be, or any or either of them, and at the costs and charges of the person or persons by whom such request shall be made, make, do, acknowledge, levy, suffer, execute, and perfect; or cause or procure to be made, done, acknowledged, levied, suffered, executed, and perfected, all such further and other lawful and reasonable acts, deeds, devices, conveyances, assignments, and assurances in the law whatsoever, either by fine or fines,

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without issue: the question was, whether the devise to the trustee and his heirs *in trust* for the heirs male of the bodies of A. and B. were executed, so as to make that a legal estate, as well as the estate for life, and therefore, whether B.'s recovery had barred C. the lessor of the plaintiff? Lord Ellenborough, C. J. The testator uses the words *trust* and *use* indifferently: both of them are within the operation of the statute; for a trust may be executed as well as a use. And nothing else is relied on but the change of these words in order to denote the testator's intention. In truth, in every case where a testator creates an estate tail by words of this description, unless he is perfectly cognizant of the technical rule of law, he does not intend to enlarge the life estate of the first taker to an estate tail: but the rule of law notwithstanding attaches to give the first taker an estate tail. Postea to the defendant. *Doe*, ex dem. *Terry* v. *Collier*, 11 East, 377. So, under a devise of lands, arrears of rent, and a bond and judgment to trustees, and the survivor, and the executors and administrators of such survivor, in trust, out of the rents and profits of the said estates and arrears, &c. to pay certain annuities for lives, and a sum in gross; and from and after payment of the said annuities and money, the testator devised successive estates for lives, remainder to C. W. in tail, remainder to his own right heirs; and he also gave a general power of leasing to the trustees for the best rent, with an allowance of 10*l.* a year to each for their trouble: it was held, that the purposes of the trust being all answered by the death of the annuitants, and the raising of the money for legacies, the remainder-man in tail (the life estate being spent) took the legal estate in the premises. For where the purposes of a trust may be answered by giving the trustees a less estate than a fee, no greater estate shall pass to them *by implication*; but the uses in remainder limited on such lesser estate so given to them shall be executed by the statute. And in this case it was held sufficient to answer the purposes of the trust, to give the trustees by

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with or without proclamations, common recovery or common recoveries, deed or deeds inrolled or not inrolled, release, confirmation, or other assurance whatsoever, for further, better, more perfectly, lawfully, and absolutely or satisfactorily granting, releasing, confirming, assigning, or otherwise assuring the said messuages, lands, hereditaments and premises hereby released and assigned, or otherwise assured, or intended so to be, and every part and parcel of the same, with the appurtenances, *To* the uses,

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implication an estate for the lives of the annuitants, with a term of years in remainder, sufficient for the purpose of raising the gross sum charged out of the rents and profits. And this construction was held to be further confirmed in this particular case, by the bequest to the trustees of the arrears, and the bond and judgment, as well as of the rents and profits; for otherwise the interest in the bond, &c. would go to different representatives than the estate, if the trustees took a fee: and the leasing power was only to be executed as the occasions of the trust required: and there was also a personal remuneration to the trustees of 10*l.* a year for their trouble, which was not extended to their heirs; who indeed were not named in the devise. *Doe*, ex. dem. *White* v. *Simpson*, 5 East, 162.

Estates for years are not within the statute, and therefore not executed, unless created anew out of a freehold estate.

IX. Estates for *years* cannot be conveyed to uses so as to be executed into legal estate by the statute, because the words of the statute are, where any person shall be *seised*, and a lessee for years is not seised, but is only *possessed;* for the word *seisin*, in the language of the law, is exclusively applied to estates of freehold and inheritance, Litt. s. 324; Co. Litt. 200 b, because there needs no livery of seisin to be made to the lessee, Litt. s. 59: therefore if A., possessed of a lease for years, assign it to B. to the use of C., the legal estate is in B., and C. takes only a trust or equitable estate: but A., seised in fee, may convey his estate to B. to the use of C. for years; or A. seised in fee, may bargain and sell, or covenant to stand seised to the use of C. for years; and such use would be executed by the statute into a legal estate for years in C.

Copyholds are not within the statute.

X. The statute of uses does not extend to *copyholds*, because the transmutation of possession by the sole operation of the statute, without the consent or allowance of the lord, or the agreement of the tenant, would tend to the prejudice both of the lord and of the tenant: Co. Cop. s. 54; Tr. 124. Wms. n. 2 Saund. 12; and this is plain from

upon the trusts, and for the ends, intents, and purposes hereinbefore limited, expressed, and declared of and concerning the same, according to the true intent and meaning

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common experience; for when a copyholder surrenders to the use of another, the possession is not executed to the use; as the estate remains in the surrenderor, and surrenderee has nothing until admittance but an equitable estate: Gilb. Ten. 182; 1 Sand. Uses, 203, 3d edit. 195, 2d edit.; [241, 4th edit.;] 1 Cru. Dig. 418, 2d edit.; Cru. Uses, 55; Sug. Gilb. Uses, 72; and therefore a surrender of copyhold lands to uses is not to be considered on the foot of a use or trust; for as copyholds are not within the statute of uses, such surrender is only a direction to the lord whom to admit; and when admitted, the surrenderee is in by the grant of the lord, not of the surrenderor; so that it is of a particular nature, and not as a use or trust on the statute. *Per* Lord Hardwicke, 2 Ves. 257; 1 Watk. Cop. [100] [185]. 2 Ibid. [193]: and therefore the construction of the surrender of copyholds must be the same as if the estates had been limited by feoffment, or any other deed, deriving its effect purely from the principles of the common law, without the intervention of the statute of uses, and must be alike governed by the same rules of the common law. *Per* Holt C. J. 1 P. Wms. 76. And therefore it should of consequence follow, that springing uses, or uses to arise in future, cannot be created by surrender. Gilb. Ten. 260-261; Watk. n. 5 Bac. Abr. 779. Mr. Watkins says, that a fee cannot be limited on a fee by a common law conveyance, is not necessary to be proved; it is acknowledged. And surely if a surrender of copyhold lands is to be construed as a common law conveyance, it must follow, as an inevitable consequence, that a fee cannot be limited on a fee by a surrender: for if a fee *can* be limited on a fee by a surrender, then the surrender *cannot* be construed as a conveyance at common law. And on the same principle, if an estate for life, or of inheritance, cannot be created to commence *in futuro* by a common law conveyance, and a surrender of copyholds ought to be construed as such conveyance at common law ought to be construed, then an estate for life, or of inheritance, cannot be created to commence *in futuro* by a surrender of copyholds. If we acknowledge the premises, we must not deny the conclusion. 1 Watk. Cop. [208]; Sug. n. Gilb. Uses, 353. The learned Mr. Sanders, however, is not satisfied with this reasoning, in the shape of a syllogism; he says, *syllogismus assensum constringit, non res:* and endeavours to show, that the use limited on an *immediate* surrender, has no resemblance to a feoffment at the common law before the introduction of uses; but that it closely corresponds with the use, in its fiduciary

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of these presents; *As* by the person or persons so entitled and making such request, or his, her, or their counsel in the law, shall be reasonably devised or advised, and re-

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state, on a feoffment: Sanders on Surrenders of Copyholds, page 7: and after observing that there can be no doubt that by means of *uses* limited on feoffments, or other common law conveyances, a freehold may be created to commence *in futuro*, without a previous particular estate to support it, and that a fee may be limited upon a fee, or that pre-existing uses, commensurate to the fee simple, may be defeated by contingent, springing, and executory uses; and that the question to be considered is, whether, in these instances, uses on a surrender correspond with uses on feoffments, or other common law conveyances; he proceeds to shew, that the resemblance between them is not destroyed or opposed by any *direct decision*; and that consequently there will be no material difficulty in establishing the analogy between them by authority, as well as principle; page 20; and he comes to the conclusion, that the authorities in favor of the limitation of a *future* use, on an immediate surrender of a copyhold, appears satisfactory; 36; and that springing, contingent, and executory uses, may be limited upon a surrender, defeating, by their operation, uses previously existing by limitation and admittance; page 43; from whence he assumes that powers of revocation and appointment are applicable to settlements of copyhold estates because a use, arising under the exercise of a power, is a springing use, page 57. Considerable reliance is placed on *forms of deeds* in Lex Customaria, Jacob's Court Keeper, the English Copyholder, and Horseman's Conveyancing; but the errors of these books can be of no authority, when the principle they would establish is contrary to reason; and besides there are other forms in all these books, which would equally countenance the contrary doctrine. The learned gentleman also says, page 47, Kitchen, 170, edit. 1657, one of the oldest writers on copyholds, says, "use may be of copyhold, as well as of freeholds." But the words which immediately succeed in Kitchen are omitted, *viz.* "but the statute of 27 Hen. VIII. for uniting the possession to the use, doth not extend to such tenures: nor (he to whose use) cannot forfeit the land by cutting trees, if it were not by the consent and commandment of the *copyholder*." Kitchen on Courts, 172, edit. 1663. Mr. Fearne appears to have been of the same opinion as Mr. Sanders; Contingent Remainders, 201, 3d edit. 417, 4th edit. 276, Butl. edit. See 5 Cru. Dig. 590, s. 98, 2d edit.

Since writing the above note, Mr. Scriven has entered largely into a confutation of Mr. Sanders's Treatise on Surrenders of Copyholds,

quired and tendered to be made, done, and executed. IN WITNESS, &c.

CONFIRMATION, RELEASE IN FEE, AND ASSIGNMENT ON TRUSTS FOR SALE.

ATTESTATION *of the Infant's Execution after she became of age.*

Attestation of execution by a person who afterwards became of age.

SIGNED, SEALED, AND DELIVERED, by the within-named [ ] on the day of , one thousand eight hundred and , she being then of the age of twenty-one years, in the presence of us,
A. B., of, &c.
C. D., of, &c.

If the late infant be married at the time of the execution, a fine from her and her husband will be requisite to convey her interest. So if the late infant be a man, and his estate be legal, a fine would be requisite to bar his wife's right to dower.

Generally, a married adult cannot convey by executing a deed made during infancy, without levying a fine.

There does not appear to be any objection under the stamp laws to the execution of a deed by a person attaining majority subsequently to the date of the deed. [See *Lewis* v. *Bingham*, 4 B. & A. 672, and Vol. II. 654.]

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1 Scriven on Copyholds, 185, 207, &c. 2d ed. [See also Mr. Coventry's edition of Watkins on Copyholds, 1st Vol. 263.

[In *Boddington* v. *Abernethy*, 5 B. & C. 776, the question whether uses of copyholds can arise *in futuro* upon a contingency, and so as to defeat prior vested estates, was discussed, when it was determined that the prior vested estates might be defeated by means of a power. This case was sent by the Master of the Rolls to the Court of King's Bench; so that according to the custom on such occasions, the reasons for the determination of the learned Judges are unfortunately not stated. *Ed.*]

BY HEIR OF DEVISEE BY EQUITABLE TENANT IN TAIL OF COPYHOLDS.

CONFIRMATION *of a* DEVISE *of a* COPYHOLD *to a Younger Son, where the* TESTATRIX BEING EQUITABLE (*a*) TENANT IN TAIL, *with the Equitable Remainder in Fee, only the Equitable Remainder in Fee passed by her Will, but the Heir being desirous to establish the Devise intended to have been made,—For that purpose, the Heir and the Devisee, on the Day of the Date of this Indenture, have surrendered to the Use of Trustees in Fee the devised Premises; with a Memorandum, that the Surrender was made to the Trustees, Upon such Trusts, &c. as the Devisee should by his Will appoint; and in default of Appointment, In Trust for the Devisee in Fee. Testatum,* COVENANT *by the Heir for further Assurance; and for Peaceable Enjoyment: and* COVENANT *by the Devisee with the Heir, for Peaceable Enjoyment of Copyholds devised to him.*

Parties.

THIS INDENTURE, made the day of , 18 , BETWEEN [*heir*] of, &c. eldest son and heir, and

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All equitable estates in copyholds, excepting equitable estates tail, will pass by will.

(*a*) Where a person has any equitable estate in copyholds, besides an equitable estate tail, such equity will pass by an unattested will without a surrender: for of an equity no surrender can be made: nor can the devisee require any admittance, as he will not become tenant to the lord. *Carr* v. *Ellison*, 3 Atk. 73; *Tuffnel* v. *Page*, 2 Atk. 37, n.; 2 P. Wms. 261; *Allen* v. *Poulton*, 1 Ves. sen. 121; *Attorney-General* v. *Andrews*, Ibid. 225; *Burkitt* v. *Burkitt*, 2 Vern. 499; *Carey* v. *Askew*, 1 Cox,

BY HEIR OF DEVISEE BY EQUITABLE TENANT IN TAIL OF COPYHOLDS.

a devisee named in the last will and testament of [*testatrix*], late of, &c. widow, deceased, who survived, and was a devisee named in the last will and testament of [*husband*], late of, &c. her late husband, also deceased; and which said [*testatrix*] was the only surviving child of [R. B.], late of, &c. deceased, by Mary his wife, also deceased, before her marriage with him, called [Mary L.], of the one part; and [*devisee*] of, &c. the younger son of the said [*testatrix*], and a devisee named in her last will and testament, of the other part. WHEREAS the said [*testatrix*] made and duly executed her last will and testament in writing, bearing date on or about the day of , 18 , and thereby, amongst divers other devises and bequests therein contained, gave, devised, and appointed her copyhold messuage or dwelling house, &c. unto and to the use of her said son [*heir*], his heirs, sequels in right, and assigns for ever: *And* she gave, devised, and appointed her two copyhold messuages, &c. unto and to the use of her said son [*devisee*], his heirs, sequels in right, and assigns for ever. AND WHEREAS the said [*testatrix*] departed this life soon after making and executing her said will, without revoking or varying the same. AND WHERE-

Recital of a will of copyholds, whereby testatrix gave one copyhold estate to her heir, and another to a younger son:

death of testatrix:

that testatrix,

244; *Macnamara* v. *Jones*, 1 Bro. C. C. 480; *King* v. *King*, 3 P. Wms. 360, and Cox's note (1) [*Greenhill* v. *Greenhill*, Gilb. Eq. Rep. 79. *Wainewright* v. *Elwell*, 1 Madd. 634, and *Kenebel* v. *Scrafton*, 8 Ves. 30.]; 1 Watk. Cop. 124, 131, 180.

An equitable intail in copyholds must be docked before it can be devised:

But an equitable estate tail will not pass by devise. For, as in the case of an equitable estate tail in freehold lands, a fine or recovery is requisite in order to destroy it; *Boteler* v. *Allington*, 1 Bro. C. C. 72; *Salvin* v. *Thornton*, cited Ibid, 73, n. (2); *Legate* v. *Sewell*, 1 P. Wms. 91; so in that of copyholds, the entail must be first docked, as if it were a legal entail: and the estate will not pass merely by the devise. *Rowe* v. *Lowe*, 1 Hen. Bla. 446, 461. *Vide ante*, Vol. I. 159, *ad ultimo*.

As to a will of copyhold, *vide ante*, 477; *post*, 533.

The whole doctrine respecting equitable recoveries is contained in the very learned and admirable opinions of Lord Eldon, when Solicitor General, Mr. Madocks, and Mr. Fearne, upon the validities of the recoveries suffered by the Marquess of Bath, 1 (Hargrave's) Collectanea Juridica, 214. See also *ante*, Vol. I. 16, and the cases cited, 17.

BY HEIR OF DEVISEE BY EQUITABLE TENANT IN TAIL OF COPYHOLDS.

being equitable tenant in tail, with equitable remainder in fee,

only the equitable reversion in fee passed by her will,

but the heir being satisfied that testatrix intended to pass the whole inheritance to devisee, he has agreed to establish the devise intended to to have been made:

and for that purpose heir and devisee have surrendered,

to the use of trustees in fee, devised premises;

with a memorandum, that the surrender was made to the trustees,

AS since the decease of the said [*testatrix*] it has been discovered, that she the said [*testatrix*], at the time of making and executing her said will, as being the only surviving child of the said [R. B.] by the said Mary his wife, was, in virtue of the settlement made previous to their marriage, bearing date, &c. entitled only to an equitable estate tail in possession of and in the said copyhold messuages and premises by her said will devised to the said [*devisee*], and to the immediate equitable reversion in fee thereof; and that consequently only the equitable reversion in fee in the same premises passed by the said will; and the said estate tail, on her decease, descended and came to the said [*heir*]; but the said [*heir*] being well satisfied that it was the intention of his mother the said [*testatrix*] to devise and pass by her said will to the said [*devisee*] the whole inheritance of the same two messuages and premises, free from any estate tail, therefore he the said [*heir*], in order to do justice to that intention, has voluntarily proposed and agreed to make, do, or join in all such acts and surrenders as may be necessary or requisite for supplying the defect in the said will, and for establishing the disposition thereby made, or intended to be made of the said two messuages and premises, in favour and for the benefit of the said [*heir*]: AND for effectuating that purpose, the said [*heir*] hath in and by one surrender bearing even date with these presents, together with the said [*devisee*], surrendered into the hands of the lord, according to the custom of the manor of aforesaid, *To the use* of [G. H.], of &c. and [J. G.], of, &c. and their sequels in right, *The* said two messuages and premises devised, or intended to be devised to the said [*devisee*] as aforesaid, by the following description, namely, (*insert description*); *To* which said surrender is subscribed a memorandum (*b*), whereby it is declared, that the premises comprised in the said surrender are thereby so surrendered to the use of the said [G. H.] and [J. G.], and their se-

Trusts should be exemplified on court rolls.

(*b*) This is unavoidable in the case of a surrender to the use of a will until the death of the testator. But at the next court after his death, the trusts of the will should be inserted on the court rolls. However, although it is generally desirable to have the trusts inserted

quels in right, *Upon such trusts*, and to and for such intents and purposes, as the said [*devisee*], by his last will and testament in writing, by him to be duly signed and

Upon such trusts, &c. as devisee should by his will appoint;

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in the court rolls, yet they may be omitted. *Vide ante*, Vol. I. 563; Vol. II. 340. For the form of the exemplification of the trusts on the court rolls, *vide ante*, Vol. II. 342.

But an actual surrender to the use of a will of copyholds is not necessary, since the 55 Geo. III. cap. 192, the act of the late and lamented Sir Samuel Romilly, entituled *An act to remove certain difficulties in the Disposition of Copyhold Estates by Will*; which received the royal assent 12th July, 1815, and which act is as follows; "Whereas by the customs of certain manors, *copyhold estates* (A) of such manors pass by the last will and testament of the copyhold tenants thereof declaring the uses of surrenders made for that pursose: and whereas much inconvenience has arisen, from the necessity of making such surrenders: for remedy whereof may it please your Majesty that it may be enacted; and be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that in all cases where by the custom of any manor in England or Ireland any copyhold tenant of such manor may by his or her last will and testament dispose of or appoint his or her copyhold tenements, the same having been surrendered to such uses as should be declared by such last will and testament, every disposition or charge made or to be made by any such last will and testament (B), by any person *who shall die after the passing of this act*, of any such copyhold tenements, or of any right, title (C), or interest in or to the same, shall be as valid and effectual to all intents and purposes, although no surrender shall have been made to the use of the last will and testament of such person, as the same would have been if a surrender had been made to the use of such will.

Dispositions by will of copyhold estates made effectual without previous surrenders to the uses thereof.

II. "Provided also, and it is hereby further enacted, That no person entitled or claiming to be entitled to copyhold lands, tenements, or hereditaments, in consequence of any testamentary disposition, shall be entitled to be admitted to the same by virtue of any thing in this act contained, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such copyhold lands, tenements, or hereditaments, to the use of such will, or in respect of the presenting, registering, or enrolling such surrender, had the same lands, tene-

Persons admitted under testamentary dispositions, to pay the like fees, &c. as would have been payable on such surrenders.

and in default of appointment,

published, in the presence of three or more credible witnesses, shall give or appoint the same: *And* in default of and until such gift or appointment shall be made and take

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ments, and hereditaments been surrendered to the use of the will of the person so disposing of the same; all such stamp duties, fees, or sums of money due as aforesaid, to be paid in addition to the stamp duties, fees, or sums of money due or payable on the admission of such person so entitled or claiming to be entitled to the same copyhold lands, tenements, or hereditaments, and the stamp duties to be affixed to the copy of the admission.

This act not to invalidate devises of copyholds, &c.

III. "Provided always, and it is hereby enacted and declared, That nothing in this act contained shall be construed, deemed, or taken, at law or in equity, to render invalid or ineffectual any devise or disposition of any copyhold lands, tenements, or hereditaments, or of any right, title, or interest in or to copyhold lands, tenements, or hereditaments, which would be valid or effectual if this act had not been made; or to render valid and effectual any devise or disposition of any copyhold lands, tenements, or hereditaments, or of any right, title, or interest in or to any copyhold lands, tenements, or hereditaments, which would be invalid or ineffectual if a surrender had been made to the use of the last will and testament of the person attempting to dispose of the same by will; any thing hereinbefore contained to the contrary notwithstanding."

Observations on the above Statute.

It seems, that the 55 Geo. 3, c. 192, extends to customary freeholds, where the custom has been to surrender to the use of a will.

(A) It seems, that this act extends to customary freeholds held by copy of court roll, where custom has established the right to surrender to the use of a will. *Hussey* v. *Grills*, Ambl. 301; *Doe* v. *Danvers*, 7 East, 299; *vide post* (B).

The difference between copyhold estates in a strict sense, and customary freeholds.

The difference between copyhold estates in a strict sense, and customary freeholds, is, customary freeholds are not held *at the will of the lord*, but only *according to the custom of the manor*. 2 Bla. Com. 149; Harg. n. Co. Litt. 59, b. (1). These customary freeholds are of such an amphibious nature, that, when compared with mere copyholds, they may with sufficient propriety be called freeholds; and, when compared with absolute freeholds, they may with equal, or greater propriety, be denominated copyholds. 1 Bla. Law Tracts, 8vo. ed. 105.

The statute of frauds, so far as it relates to

(B) The 29 Car. II. c. 3, so far as relates to wills, did not extend to copyhold lands; consequently a will of such lands, operating merely

effect, the said premises shall be *In trust* for the said [*devisee*], his heirs and sequels in right. NOW THIS INDENTURE WITNESSETH, that the said [*heir*], in com-

in trust for devisee in fee. Testatum.

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as a declaration of the use, did not require to be attested and subscribed in the presence of the devisor by three or four credible witnesses. Therefore, if a person surrendered a copyhold estate to such uses as he should by will appoint, a will, though attested by two witnesses, or by one only, or not attested at all, would have been sufficient to pass it; nor would it require a signature, unless a signature were made necessary by the terms of the surrender to the use of the will; *Tuffnell* v. *Page*, 2 Atk. 37; Barnard. Rep. in Chanc. 11, 12; *Attorney General* v. *Andrews*, 1 Ves. sen. 225; *Wagstaff* v. *Wagstaff*, 2 P. Wms. 258; *Carey* v. *Askew*, 2 Bro. C. C. 58; *Habergham* v. *Vincent*, 2 Ves. jun. 228, 232; *Roe* dem. *Gilman* v. *Heyhoe*, 2 Wm. Bla. 1114; *Doe* dem. *Cook* v. *Danvers*, 7 East, 299, 322; Phillips on Evidence, 4th edit. 527; [6th ed. 1st Vol. 475]; 7 Bac. Abr. Gwill. edit. 315; consequently, as the above act 55 Geo. III. c. 192, does not require any witnesses to a will of copyhold lands, a will of the same nature as would pass a chattel interest will equally pass a copyhold estate.

wills, does not extend to copyholds.

Where a man made his will attested by *three* witnesses, and thereby (among other things) devised a copyhold estate, and afterwards caused such will to be altered, by striking out several of the freehold devises, and a memorandum to be written, that he had examined, perused, and approved of the will so altered; but did not republish it in the presence of *three* witnesses, but directed it to be written out fairly, and became delirious before it was returned, it was held sufficient, and the trustees were decreed to surrender accordingly. *Burkitt* v. *Burkitt*, 2 Vern. 498. This was a devise of an equitable copyhold estate, (as to which *vide ante*, 530, (*a*),) but (as *æquitas sequitur legem*), it seems that the principle of the decision is equally applicable to a will of a legal copyhold estate since the above statute.

In *Carey* v. *Askew*, 2 Bro. C. C. 59, Lord Kenyon, Master of the Rolls, said, "It has been held, that a will, received by the ecclesiastical court, will govern the surrender of a copyhold." 1 Cox, 244, S. C. and S. P. In that case C. by his will devised all his freehold and copyhold estates to his two daughters, A. and M. and all other daughters that he might thereafter have, as tenants in common in fee. He had afterwards another daughter L. He then gave directions for another will, by which he gave all his real estates to his two eldest

Any will received by the ecclesiastical court will pass copyholds: therefore instructions for a will are sufficient.

Covenant by heir for further assurance.

pliance with the intention of the said [*testatrix*], in her said will expressed, doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree

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daughters, and a sum of 15,000*l.* to his daughter L. The attorney took minutes of this second will in writing; but before it was prepared the testator died. These minutes were proved in the spiritual court as a testamentary paper. His Honour held, first, that this paper being proved in the spiritual court, it was sufficient to pass the copyhold estate: and secondly, but that it was so totally void as to the freehold, that it would not put L. to her election under which will she would take, and she would therefore take her share of the freeholds, under the first will, as well as the 15,000*l.* under the second.

A will to direct the uses of a surrender of a copyhold, or of a customary estate passing by surrender, is not within the statute of frauds, and needs not be signed, unless such signature be required by the terms of the surrender to the use of the will.

So in *Doe* on the demise of *Cooke and wife* v. *Danvers*, 7 East, 299, the estate appeared, by a case reserved at the trial, of ejectment, for the opinion of the Court of King's Bench, to be holden of the manor of Stebanheath, otherwise Stepney, in Middlesex, by copy of court roll (but not *ad voluntatem domini*,) and to pass by *surrender* and admittance, and to have been leased under a previous licence from the lord; and it also appeared to have been surrendered by the late owner to the uses of her will. And the court ruled, that it being so circumstanced, whether held *at the will of the lord* or not, *the freehold was in the lord*, and not in the tenant; and that with respect to all the questions arising in the case, it was to be taken and considered as copyhold.

The court had entertained a doubt how far the will could be considered a will in writing under the terms of the surrender; and whether, under the 7th and 9th sections of the statute of frauds, the will must not be signed by the party, as thrown out by Lord Kenyon in *Doe* d. *Tempest* v. *Dancer*, (1796), and according to what is reported to have been said by Lord Hardwicke, in *Tuffnell* and *Page*, "that when such will was in writing, and signed by the party, that was sufficient." But they now expressed themselves satisfied, that a will to direct the uses of a surrender of a copyhold or of a customary estate *passing by surrender*, was not within the statute of frauds, and need not be signed, unless such signature be required by the terms of the surrender to the uses of the will; and added, that although they thought it would have been the sounder construction to have holden, that copyholds were comprised in the general words of the 5th and 6th sections of the act, "all devises and bequests of any lands or tenements; yet it was a settled point, that the lands pass by the surrender and will taken together, as if the devisee's name was inserted in the surrender, and that

to and with the said [*devisee*], his heirs and assigns, that he the said [*heir*] and his heirs, and all and every other person and persons having or lawfully claiming, or who

BY HEIR OF DEVISEE BY EQUITABLE TENANT IN TAIL OF COPYHOLDS.

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they do not pass by the will: that the 7th section, requiring declarations or mentions of trusts of land to be in writing, signed by the party enabled to declare the trust, or by his will; and the 9th section, requiring all grants and assignments of trusts to be also in writing, signed by the party granting or assigning; or by such last will or devise, did not extend to surrenders of copyhold or customary estates, but referred only to such will as the statute recognized, *viz.* a will attested by three or four witnesses,—a will of such lands not being a creation or declaration,—or a grant or assignment of a trust. And as to the question which had arisen, whether the will stated in the case was to be considered a will in writing, the court, (referring to 1 And. 34; 3 Leon. 79; 2 Keb. 128; *Carey* and *Askew*, 2 Bro. Rep. and a note to *Wagstaff* v. *Wagstaff*, 2 P. W. 259, (1),) also ruled, that the instrument in question, which was the written instructions for a will disposing of the above customary estate to the lessor of the plaintiff, and which had been pronounced as the will of the testator by the prerogative court, was a will in writing within the terms of the surrender; and judgment was therefore given for the plaintiff. [And see *Jervoise* v. *Duke of Northumberland*, 1 Jac. & Walk. 570; *Brodie* v. *Barry*, 2 Ves. & Bea. 130.]

Mr. Watkins says, 1 Cop. 130, it should seem that a will by *parol* only would be sufficient for this purpose. A will by *parol* was good as to lands *devisable* by custom before the statute of frauds. See Co. Litt. 111, a. (3): and in the old writ of *ex gravi querela*, the custom was alleged generally, "to devise by last will." It does not seem probable that a will in writing should be required of a burgess or villein, who were not permitted even to have their children taught to read without a licence from the lord, (see Paroch. Antiq. 401,) till they were enabled by statute 7 Hen. IV. c. 17, An. Dom. 1405. The surrender of a copyhold is made "to such uses as A. B. shall by his last will appoint:" now I know of no law which says, that such last will must be in writing. It has been noticed above, that where lands were devisable by custom, such devise need not be in writing: and the statutes of Henry the Eighth and Charles the Second, relative to wills, do not embrace a will of copyholds. If, therefore, neither the general custom, nor a positive law, nor the particular surrender, require such will to be in writing, what reason can be given why a will by *parol* should

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shall or may hereafter have or lawfully claim any estate, right, title, interest, or incumbrance of, in, to, or out of the said two messuages, &c. (*for further assurance of copy-*

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not be good? *Quære.* Whether the 19th section of the 29th Car. II. cap. 3, relative to nuncupative wills, does not extend to copyholds, it being general.

Where there is a surrender to the use of a will, the will as to form must pursue the directions of the surrender.

However, if a particular mode of executing a will of copyholds be prescribed, and certain ceremonies required by the surrender, such mode must be pursued, and such ceremonies observed, and the particular directions must be complied with as to such will; for otherwise it will not be an execution of the power.

A devise of customary freeholds, where there is no custom to surrender to the use of a will, must be according to the statute of frauds, whether it be of the legal or equitable estate.

In *Hussey* v. *Grills*, Ambl. 301, there was no evidence that there could be in the particular manor a surrender of a customary freehold to the use of a will: and it was agreed that there never was any such. The question was, whether the trust of a customary freehold shall follow the rules as to copyholds? Lord Hardwicke said, "the foundation of the determinations as to copyholds is, that the party may dispose by surrender and will. As there is no method of passing the legal estate of these customary freeholds in this way, there is no reason to hold them out of the statute of frauds; and as the legal estate is not, so is not the trust. So in the above case of *Doe* v. *Danvers*, 7 East, 299, the court appear to have made a distinction as to the applicability of the statute of frauds, between a devise of customary lands passing by *deed* and admittance, and a will of the like lands passing by *surrender* and admittance. It seems clear, that customary lands passing by *deed* and admittance, are within the statute of frauds, 29 Car. II. c. 3. s. 5, and so the late Mr. Watkins appears to have thought. 1 Watk. Cop. 131, (*t*). However, Mr. Scriven appears to be of a contrary opinion. 2 Scriv. Cop. 640-1.

Where by the custom copyholds pass by surrender and a will pursuant thereto, a will, since the act, defeats freebench:

(C) Before the above act, if a husband had made a surrender of his own copyhold lands to the use of his will, and had afterwards made a will pursuant to the surrender, as the will took effect by relation to the surrender, the claim of the widow to freebench would have been thereby defeated. 2 Watk. Cop. 74. Therefore since the above act, where it has been the custom of the manor to pass copyholds by a surrender, and a will in pursuance thereof, a will alone will be sufficient to defeat the wife's right and title to freebench.

but not where the customary mode is to devise without a surrender.

However, as to a devise good by special custom, *without a surrender* to the use of a will, a husband cannot defeat the claim merely by *devise*; as the devise cannot take effect *till his decease*, when the freebench attaches. The above act only extends to cases where by the

hold, ut ante, Vol. I. 575). And this indenture further witnesseth, (*add covenant from the heir for the quiet enjoyment of the devisee, his brother.*) And this indenture further witnesseth, (*add covenant from the devisee for the quiet enjoyment of the heir of the premises devised to him*). In witness, &c.

Second testatum. Covenant by heir for quiet enjoyment by devisee. Third testatum. Covenant by devisee for quiet enjoyment by heir of lands devised to him.

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custom copyhold estates pass by will declaring the uses of surrenders made for that purpose.

[Where a person devised "all my freehold and copyhold messuages, &c. the copyhold parts thereof having been duly surrendered to the use of this my will," as there was a manifest intention to devise his copyholds, they were held to pass, although in fact no surrender had been made of them. *Oxenforth* v. *Cawkwell*, 2 Sim. & Stu. 558. See also *Hodgson* v. *Merrest*, 9 Pri. 556. *Ed.*]

CONFIRMATION *by the Testator's next of Kin of Payments made to the Legatees under his Will, whereby he gave his Residuary Personal Estate to such of his Nephews and Nieces as should be living when the Youngest came of Age; and Consent to the Payment of the Residue when the Youngest Child shall come of Age.*

BY NEXT OF KIN OF PAYMENTS BEFORE LEGACIES VESTED.

To all to whom these presents shall come, [*next of kin*] of, &c. spinster, *sendeth greeting*. Whereas [*testator*] late of, &c. deceased, made his last will and testament in writing, bearing date, &c. and thereby, after giving several pecuniary legacies, gave and bequeathed all the residue of his personal estate and effects unto his nephews and nieces J. C. T. and M. C. children of his cousin J. C. of, &c. after the youngest of them should attain the age of twenty-one years, to be equally divided amongst them, or such of them as should be then living: *And* ap-

Exordium. Recital of will, whereby testator gave his residuarypersonal estate to such of his nephews and nieces as should be living when the youngest came of age:

appointment of executors

BY NEXT OF KIN OF PAYMENTS BEFORE LEGACIES VESTED.

pointed J. H. and H. J. executors of his said will: *And* soon afterwards departed this life, without altering or revoking the same. And whereas the said J. H. and H. J. immediately after the decease of the said [*testator*], accepted the said executorship, and afterwards duly proved the said will. And whereas the said J. C., at the time of the making of the said last will, had only three sons living, (to wit) J., C., and T., and only one daughter, named J., since intermarried with W. T., of, &c. being the same person meant and described in the same will by the name of M. C. And whereas the said J. T. being a minor under the age of twenty-one years, it is apprehended that neither she, nor any of them the said J. C., C. C., and J. C. the son have as yet acquired any vested right or interest in or to any share of the said residuary part of the personal estate of the said [*testator*]; nevertheless the said H. J., at the pressing instance and request, and by and with the mutual consent of the said J. C., C. C., T. C., and W. T. and J. his wife, hath some time since, by and out of the said residuary part of the personal estate of the said [*testator*], paid to the said [*legatees*], and W. T. and J. his wife, the sum of one thousand pounds, in the shares and portions following, (that is to say,) [*state the shares paid to each*]: *And* at the like instance and request, and with the like mutual consent of the same parties, the said H. J. hath this day, out of the said residuary part of the personal estate of the said [*testator*], paid to the said [*legatees*], and W. T. and J. his wife, the further sum of one thousand pounds, in the shares and portions following; that is to say; [*state the shares*]. And whereas the said [*next of kin*], (who as being the only next of kin to the said [*testator*] would, by virtue of the statute of distributions of intestates' estates be entitled to such part of his personal estate as might be undisposed of by his said will,) is well satisfied that it was the intention of the said [*testator*], by his said will, to dispose of the residue aforesaid of his personal estate in favor and for the benefit of the said four children of the said J. C., or of such of them as should be living as and when the said J. T., the youngest of the same children, should attain the age of twenty-one years, in equal shares; and that if she should die before her attaining that

death of testator: proof of will: that a niece called Mary in the will was named Jane:

that Jane being an infant, none of them have a vested interest, yet that executor hath advanced monies to them:

that testator's next of kin, who would be entitled to his undisposed of personalty, approves of the monies being advanced by the executor.

BY NEXT OF KIN OF PAYMENTS BEFORE LEGACIES VESTED.

age, in that case the same personal estate should go in equal shares to the said three sons of the said J. C. the father, or to such of them as should be in being at the time when the said J. T., if living, would have attained that age: and the said [*next of kin*] is very desirous to do justice to that intention, and by every reasonable act to establish the disposition made of the personal estate of the said [*testator*] by his said last will, as hereinbefore explained; and to prevent, as much as in her power lies, any prejudice or inconvenience that might otherwise ensue to the said H. J. on account of his having paid the said several sums of 1000*l.* and 1000*l.* to the persons and in manner hereinbefore mentioned, and before the time by the said will appointed for the payment thereof. TO THESE ENDS AND PURPOSES, THEREFORE, BE IT KNOWN, that the said [*next of kin*] doth hereby acknowledge and declare, that the said sums 1000*l.* and 1000*l.* were so paid by the said H. J. out of the said residuary part of the personal estate of the said [*testator*] to the persons, and in the shares and portions hereinbefore mentioned, with the knowledge and approbation of the said [*next of kin*]; *And* so far as she lawfully may, she doth hereby ratify and confirm the same payments; *And* she doth hereby give her consent that the said H. J. and J. H., or either of them, do and shall, on the said J. T. attaining the age of twenty-one years, pay the remaining surplus of the said personal estate to the said J. C., C. C., T. C., and J. T., or to such of them as shall be then living, in equal shares; and if the said J. T. shall die before she shall attain that age, then that the said H. J. and J. H., or either of them, do and shall pay the said remaining surplus of the said personal estate in equal shares to the same [*legatees*], or to such of them as shall be in being at the time when the said J. T., if living, would have attained the age of twenty-one years. IN WITNESS, &c.

Testatum.

Admission that the monies have been advanced:

confirmation thereof:

consent to the payment of the residue when the youngest child shall come of age.

BY HEIR OF COPYHOLDS SURRENDERED BY A WOMAN WITHOUT HER HUSBAND.

CONFIRMATION *of the Title of a Purchaser of a* COPYHOLD *Estate, where the Title was derived under a Surrender by a Married Woman alone, without her Husband, to the use of Herself for Life; Remainder to her Husband in Fee, with an intended Shifting Use in Fee, which failed of Effect; the Confirmation being by a* RELEASE *by the Heir of the Wife to the Purchaser in Fee, according to the Custom of the Manor.*

Exordium.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*heir*] of, &c. *sendeth greeting*. WHEREAS N. S., of, &c.

Recital of copyhold surrender, to the use of a purchaser:

and T. L., of, &c. did, on the day of last, surrender all and every the copyhold messuage or tenement, with the barns, stables, hay-house, yards, orchards, lands, meadows, pastures, feedings, ways, waters, commons, hereditaments, and appurtenances thereunto belonging, called or known by the names of [B.] Farm, and [B.'s], containing about acres, be the same more or less: *And* all the parcel or parcels of copyhold land, called [M.] Land, and [B.] Land, containing about acres, be the same more or less, situate, lying, and being, in the parish and manor of W., in the county of , or in some other parish or parishes thereunto near or next adjoining, into the hand or hands of the lord or lords of the said manor or manors, whereof the said copyhold premises are parcel, according to the custom of the same manor or manors, *To the use* of [*purchaser*] of, &c. his heirs and assigns for ever; *And*

purchaser's admission,

he hath been admitted tenant to the said copyhold or customary messuage, lands, hereditaments, and premises, in pursuance of, and according to the true intent and mean-

ing of such surrender. And whereas the said messuage, lands, and hereditaments were formerly the inheritance of M. S., of, &c. deceased, and the title of the said [*purchaser*] is derived under a surrender by her to the use of herself for her life, with remainder to the use of her husband J. S. in fee, with a limitation over in an event which failed of effect (*a*), namely; in case the said M. S. should survive the said J. S. her husband, since deceased. And whereas the said J. S. did not join in the surrender so made by his wife (*b*) as a surrendering party, and on that account it has been deemed adviseable that a release should be obtained from the heir at law of the said M. S. of all right, title, and interest in and to the said messuage, lands,

that purchaser's title is derived under a surrender by a married woman, to the use of herself for life, remainder to her husband in fee, with an intended shifting use (*a*) in fee, which failed of effect:

that husband did not join in surrender as a party, and therefore a release by way of

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(*a*) The whole fee being previously disposed of, this intended shifting use, in a copyhold, could not take effect. [*Sed quære.*] *Vide ante*, 526—528.

(*b*) Husband and wife may, together, surrender the wife's copyhold lands; she being, on such surrender, examined apart from her husband by the steward, as to her voluntarily doing it. Gilb. Ten. 277; 1 Watk. Cop. 63.

Husband and wife may together surrender her copyhold lands;

But as the husband becomes, on marriage, entitled to the profits of the wife's copyholds during her life, and often by custom during his own, it is said, that it would be unreasonable that the wife should be suffered to deprive him of them by force of a particular custom, without his consent: it has therefore been determined, that a custom for a feme covert to surrender without such consent, cannot be supported; because "it is contrary to law and the policy of the nation, and tends to make wives independent of their husbands." *Stephens* v. *Tyrell*, 2 Wils. 1.

but she canno alone.

However, in the above instance, the scruples of the gentleman who advised the above deed, appear to have been carried to a great length. The object of the rule is to protect the husband from being defeated of a life estate by his wife's alienation: now in the above case, the surrender gave him a copyhold estate of inheritance after his wife's death. The rule was adopted for his benefit; when it is violated, he is the only person who is injured, or who can complain. But he will not complain; because he has an estate of inheritance instead of an estate for life. His concurrence in the above surrender, it seems, must necessarily be presumed, because it was for his benefit. Probably he was one of the Homage at the same court.

BY HEIR OF COPYHOLDS SURRENDERED BY A WOMAN WITHOUT HER HUSBAND.

confirmation from her heir at law, has been deemed advisable:

of heirship: and that heir is willing to release.

Testatum.

and hereditaments, for the purpose of confirming the said title of the said [*purchaser*] in and to the same messuage, lands, and hereditaments. AND WHEREAS the said [*heir*] is the son and heir at law of R. L., late of, &c. deceased, who was the elder brother of the said M. S., and as such he the said [*heir*] is the nephew and heir at law of the said M. S.: AND the said [*heir*] is willing, and hath consented and agreed to make and execute the release hereinafter contained. NOW KNOW YE, AND BY THESE PRESENTS IT IS WITNESSED, that for confirming the title of the said [*purchaser*], and his heirs and assigns, in and to the said copyhold messuage, lands, hereditaments, and premises; and in consideration of ten shillings of lawful money of Great Britain [and Ireland] to the said [*heir*] well and truly paid by the said [*purchaser*], immediately before the execution of these presents, the receipt whereof is hereby acknowledged; *He* the said [*heir*] *hath* remised, released, and for ever quitted claim; and by these presents *doth* for himself, his heirs, executors, and administrators, fully and absolutely remise, release, and quit claim to the said [*purchaser*], his heirs, executors, administrators, and assigns, ALL THAT AND THOSE the copyhold messuage, lands, tenements, hereditaments, and premises whatsoever, which have been surrendered to the use of the said [*purchaser*], his heirs and assigns as aforesaid, and every part and parcel of the same, with the appurtenances: AND all the estate, right, title, interest, claim, and demand whatsoever, at law and in equity, of him the said [*heir*], of, in and to, out of, and upon the same messuage, lands, hereditaments, and premises, or any of them, or any part or parcel of the same, with their rights, members, and appurtenances: TO THE INTENT that the same messuage, lands, hereditaments, and premises may be, and be deemed, the absolute property of the said [*purchaser*]: TO HOLD to him, his heirs and assigns for ever, at the will of the lord of the said manor, and according to the custom of the same manor; by and under the rents, suits, and services for the same messuage, lands, hereditaments, and premises due and of right accustomed to be paid, rendered, and performed; AND discharged of and from all estate, right, title, and interest, claim and demand whatsoever of him

Release by heir.

Parcels.

All the estate, &c.

To the intent that lands may be the absolute property of purchaser.

Habendum to purchaser in fee, according to the custom of the manor; under the rents, &c.

and discharged from all right of heir.

the said [*heir*], of, in, to, out of, or upon the same messuage, lands, hereditaments, and premises, or any of them. IN WITNESS, &c.

CONFIRMATION *of a* LEASE *by One of Three Trustees, where a Testator gave Leasehold Lands to Three Trustees, upon Trust to underlease so much as he should not have leased, Two only of whom having been Parties to a Lease, and Doubts having arisen, whether Two of the Trustees were alone competent to make the Lease; therefore the other consented to confirm; and which is accordingly done by Indorsement on the Lease.*

BY ONE OF THREE TRUSTEES, WHERE TWO ONLY HAD BEEN PARTIES TO A LEASE.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*Confirmor*] of, &c. *sendeth greeting*. WHEREAS the within named [*testator*], by his last will and testament in writing, bearing date on or about the day of 18 , gave and bequeathed *All* his leasehold lands, held by virtue of leases from [*ground landlord*] of, &c. and situated in , in the parish of , in the county of , unto the within named [*lessor*] and [*other lessor*], and the said [*confirmor*], their executors and administrators, *To hold* the same unto the said [*lessors*] and [*confirmor*], their executors and administrators, for all such estate and interest as he the said [*testator*] had therein, *Upon trust*, as soon as conveniently might be, to let, set, or demise the said lands, and such parts thereof as he the said testator should not have so let, set, or demised before his death, in such parts, shares, and proportions as they might think proper, *Upon trust*, and for divers purposes expressed and declared in and by his said will; *And the said* testator appointed the said [*two les-*

Exordium.

Recital of will, whereby testator gave leasehold lands to three, upon trust, to underlease so much as he should not have leased; two of whom only are parties to the within lease:

and appointed them executors.

Death of testator:

proof of his will:

that doubts have arisen whether two of the trustees were alone competent to make the lease; and therefore the other trustee consents to confirm.

Testatum.

demise and confirmation of

parcels.

Habendum for the residue of the within mentioned term:

sors] and [*confirmor*] executors of the same will. And whereas the said [*testator*] departed this life [on or about the day of , 18 ,] without having altered or revoked his said will: *And* the said [*two lessors*] and [*confirmor*], after the death of the said [*testator*], and on or about the day of , 18 , duly proved the same will in the Prerogative Court of the Archbishop of Canterbury, and obtained letters of probate of the same. And whereas doubts have arisen whether the said [*two lessors*] were alone competent to make the lease contained in the within written indenture, without the concurrence of the said [*confirmor*]; and the said [*confirmor*], as far as he is interested at law or in equity, is willing, and hath consented to execute the lease or confirmation hereinafter contained. Now know ye, and these presents witness, that the said [*confirmor*], for obviating all doubts of the validity of the within written indenture of lease, for want of his concurrence in the same, and for the considerations expressed in the within written indenture, and for supplying the defects, if any, in the same indenture, or the lease thereby made, for want of the concurrence of the said [*confirmor*] in the same; and in consideration of ten shillings of lawful money of Great Britain [and Ireland], to him the said [*confirmor*] in hand well and truly paid, by the within named [*lessee*], at or before the execution of these presents, the receipt whereof is hereby acknowledged; the said [*confirmor*], by way of further assurance, and as far as he lawfully may or can, *hath* demised, leased, and also ratified and confirmed, *And* by these presents *doth* demise, lease, ratify, and confirm unto the said [*lessee*], his executors, administrators, and assigns, All those the piece or parcel of ground, and two brick messuages or tenements, and other erections and buildings and premises comprised in the within written indenture, and thereby demised to the said [*lessee*], or expressed or intended so to be (*Except* as in the same indenture of lease is excepted), To have and to hold the said piece or parcel of ground, &c., and all and singular other the premises hereby demised or confirmed, or intended so to be, and every part and parcel of the same, with the appurtenances (except as aforesaid), unto the said [*lessee*], his

executors, administrators, and assigns henceforth, for and during all the residue of the time of the within mentioned term of eighty years, which is now to come and unexpired: *In confirmation*, and for the purposes of giving effect to the same term; and also for supplying any defect in the same term, or in the within written indenture of lease, for want of the concurrence of the said [*confirmor*] therein, as one of the granting or leasing parties jointly with the said [*two lessors*]: *Subject nevertheless* to the rents reserved, and to the covenants, conditions, and agreements expressed and contained in the said indenture, by or on the part of the said [*lessee*], his heirs, executors, administrators, and assigns, and which are henceforth to be paid, rendered, observed, performed, and kept for or in respect of the thereby demised premises. AND THE SAID [*lessee*] doth hereby grant to the said [*confirmor*], his executors, administrators, and assigns, that the rents reserved in the within written indenture of lease, shall henceforth be payable and paid to the personal representatives, for the time being, of the said [*testator*], or their assigns; and that the covenants, conditions, and agreements therein contained, shall be observed, performed, and kept in the same or the like manner as if the said [*confirmor*] had joined in the within written indenture of lease, and the grant and demise thereby made; and the rent thereby reserved, and the covenants, conditions, and agreements therein contained on the part of the said [*lessee*], his executors, administrators, and assigns, had been entered into, to and with the said [*two lessors*] and [*confirmor*], their executors, administrators, and assigns. AND THE SAID [*lessee*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said [*confirmor*], his executors, administrators, and assigns, that he the said [*lessee*], his executors, administrators, or assigns, shall or will pay the said rent, and observe and perform the said covenants, conditions, and agreements accordingly. (Add covenant by [*confirmor*], that he has not incumbered, *ut ante*, Vol. II. 531, *mutatis mutandis*.) IN WITNESS, &c. (*ut ante*, Vol. II. 507.)

BY ONE OF THREE TRUSTEES, WHERE TWO ONLY HAD BEEN PARTIES TO A LEASE.

Subject to the rents and covenants contained in the lease.

Covenant by lessee with confirmor, that rents reserved, and covenants contained in lease, shall be paid and performed in the same manner as if confirmor had joined in lease;

and that lessee will pay and perform same accordingly.

Covenant by confirmor, that he has not incumbered.

OF A LEASE BY LESSOR, WHO SUBSEQUENTLY ACQUIRED LEGAL ESTATE.

CONFIRMATION *of a Lease by the Lessor, who had not the Legal Estate when he executed the Lease, but who subsequently acquired it.*

Parties.

THIS INDENTURE, made the day of 18 ; BETWEEN the within named [*lessor*], of the one part, and the within named [*lessee*], of the other part.

Recital, that in order to remove all doubts whether a term is legal or equitable, the lessor in whom the legal estate is now vested, agrees to confirm the lease.

WHEREAS, for the purpose of removing all doubts whether the term granted by the within written indenture, is a term of legal or equitable estate, the said [*lessor*], in whom the legal estate of inheritance is now vested, hath consented and agreed to make and execute the demise and confirmation hereinafter contained.

Testatum.

NOW THIS INDENTURE WITNESSETH, that in pursuance and in exercise of every power and authority, powers and authorities, enabling the said [*lessor*] in this behalf, by way of confirmation or further assurance, as far as these presents can operate by confirmation, and as far as these presents cannot operate by confirmation, then by way of appointment or demise, *He* the said [*lessor*] *hath* directed, limited, and appointed, and also granted, demised, and confirmed ; *And* by these presents *doth* direct, limit, and appoint, and also grant, demise, and confirm to the said [*lessee*], his executors, administrators, and assigns, ALL THAT plot, piece, or parcel of land, messuage, or dwelling-house and buildings, liberty or privilege, hereditaments and premises, mentioned and comprised in the within written indenture, and thereby demised or expressed, or intended so to be, and every part and parcel of the same, with the appurtenances.

Appointment, grant, and demise of

Parcels.

Habendum for residue of term;

TO HAVE AND TO HOLD the said plot, &c. hereby demised or confirmed, or otherwise assured, or intended so to be, and every part and parcel of the same, with the appurtenances,

unto the said [*lessee*], his executors, administrators, and assigns, henceforth for and during all so much, and such part of the time of the term granted, or intended to be granted by the within written indenture, as is now to come and unexpired: SUBJECT *nevertheless* to the same or the like rent, as was reserved by the within written indenture, and to be payable in the same manner, or the like manner, and on the same days, as that rent was made payable: *And subject* to the same or the like covenants, provisoes, conditions, or agreements, as were or are contained in the same indenture on the part of the said [*lessee*], his heirs, executors, administrators, or assigns, to be paid, done, observed, and performed. AND THE SAID [*lessee*] doth by these presents, for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said [*lessor*], his heirs and assigns, that he the said [*lessee*], his heirs, executors, administrators, or assigns, shall or will henceforth, from time to time, during the continuance of the term hereby granted or confirmed, or intended so to be, well and truly pay, satisfy, and discharge the yearly rent of pounds shillings, mentioned in, and reserved, or intended to be reserved by the within written indenture, and by these presents, when and as the same rent shall henceforth become due and payable: *And* from time to time, during the continuance of the same term, observe, perform, fulfil, and keep, all and singular the covenants, stipulations, and agreements, expressed and contained in the within written indenture, or the counterpart thereof; and which by and on the part and behalf of the said [*lessee*], his executors, administrators, and assigns, are or ought to be henceforth observed, performed, and kept, for or in respect of the premises demised by the within written indenture, or intended so to be, as far as the same covenants, conditions, and agreements can be observed and performed with reference to the term granted or confirmed by these presents. AND THE SAID [*lessor*] doth by these presents, for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said [*lessee*], his executors, administrators, and assigns, that he the said [*lessor*], his heirs, executors, administrators, or assigns, shall and will henceforth, from

OF LEASE BY LESSOR, WHO SUBSEQUENTLY ACQUIRED LEGAL ESTATE.

Subject to the rents reserved;

and the covenants contained in the lease.

Covenant by lessee to pay the rent,

and perform the covenants during the residue of the term.

Covenant by lessor to perform the covenants on his part, during the residue of the term.

OF LEASE BY LESSOR, WHO SUBSEQUENTLY ACQUIRDD LEGAL ESTATE.

time to time, during the continuance of the term granted or confirmed by these presents, well and truly observe, perform, fulfil, and keep all and singular the covenants, stipulations, and agreements expressed and contained in the within written indenture of lease, or the counterpart thereof, and which, by and on the part and behalf of the said [*lessor*], his heirs, executors, administrators, and assigns, are henceforth, in respect of the messuage and other the premises demised by the within written indenture, to be observed, performed, and kept, as far as the same can be observed, performed, and kept, with reference to the term granted or confirmed by these presents. IN WITNESS, &c.

COVENANT TO LEVY FINE, WHERE LAND HAD BEEN DESCRIBED IN WRONG PARISH.

CONFIRMATION *by way of* COVENANT *by Three Vendors severally* TO LEVY A FINE sur conuzance de droit, *at the Purchaser's Expense, to Uses to prevent Dower, of a Close described in the Lease and Release to be in a wrong Parish:* COVENANT *by the Three Vendors severally, separate from the others, and only as to the Acts of Himself, his Heirs, &c. that the Covenantors respectively, and their respective Heirs, &c. will perform the Covenants in the Release, concerning the Close therein described, in the same manner as if the same Covenants had been concerning the Close herein comprised; so that the said Covenants may have the same Effect, as to the Close herein comprised, as if the same Close had been the Close described in the Release.*

THIS INDENTURE [OF THREE PARTS], made the day of , in the year of our Lord 18 .;

BETWEEN [*three vendors*] of, &c. of the first part; [*purchaser*] of, &c. of the second part; and [*trustee to prevent dower*] of, &c. of the third part. WHEREAS by indenture of lease, bearing date on the day next before the day of the date of these presents, and indenture of release, bearing even date with these presents, [and being of three parts,] and made, or expressed to be made, between the said [*three vendors*], of the first part; the said [*purchaser*], of the second part; and the said [*trustee to prevent dower*], of the third part; in consideration of the sum of hundred and pounds, to the said [*three vendors*] well and truly paid by the said [*purchaser*], *All that* close, piece, or parcel of ground, called or known by the name of G. Close, and further described as containing by estimation acres, more or less, and as situate, lying, and being in C. in the county of M., formerly in the tenure or occupation of J. L., afterwards of T. B., since of J. R., his undertenants or assigns, and now or late of T. B.: *And* all hedges, ditches, fences, pales, rails, waters, watercourses, profits, commodities, advantages, emoluments, and appurtenances whatsoever, to the said close or parcel of land, hereditaments, and premises belonging, or in any wise appertaining, have been conveyed, or otherwise assured by the said [*three vendors*] to divers uses, and upon divers trusts, and for divers ends, intents, and purposes, by the same indenture of release limited, expressed, and declared, of and concerning the same close and hereditaments, being the same uses, trusts, ends, intents, and purposes as are contained in these presents. AND WHEREAS the said close or parcel of land and hereditaments so released, or otherwise assured as aforesaid, were formerly called by the name of G. Close, but are now, and for many years past, have been better known by the name or description of L. Close, otherwise L. Shot. AND WHEREAS the said close, piece, or parcel of land and hereditaments, are situate in the parish of K., in the said county of M., and not in the parish of C. AND WHEREAS the said [*one of the vendors*] and his ancestors have been in the possession or seisin of the said close, piece, or parcel of land and hereditaments, and in the perception of the rents and profits thereof for years and upwards.

Parties.

Recital of lease and release, whereby lands have been conveyed to the same uses, &c. as are herein contained.

Recital that a close is better known by a modern than by an ancient description;

that the close is in the parish of K. and not in C.

seisin of one of vendors and his ancestors for a great number of years:

that one of vendors is heir at law of persons successively seised:

AND WHEREAS the said [*one of the vendors*] is the heir at law of the several persons who succesively have been seised of the said close, piece, or parcel of land and hereditaments so released or otherwise assured as aforesaid.

that mistake in name of parish was not discovered till lease and release had been executed:

AND WHEREAS the said mistake in the name of the parish was not discovered until the said indentures of lease and release had been executed; and the mistake originated in describing a certain other close, called or known by the name of R. Close, and which is in the parish of C., as being in the parish of K., in describing the said close called G. Close, otherwise L. Close, otherwise L. Shot, to be in the parish of C., while the same is in the parish of K.; thus reversing the manner of the parishes.

that for purchaser's satisfaction, vendors have consented to levy a fine of the close, to the uses, and enter into covenants hereinafter contained.

AND WHEREAS for the satisfaction of the said [*purchaser*], the said [*vendors*] have consented to levy a fine of the said close, piece, or parcel of land, now called or known by the name of L. Close, otherwise L. Shot, and to declare the uses of the said fine, in such manner as hereinafter mentioned, and to enter into the covenants hereinafter contained on their parts.

Testatum.

NOW THIS INDENTURE WITNESSETH, *and it is hereby declared and agreed* by and between the parties to these presents, *And* each of them the said [*three vendors*] severally, separate and apart from the others of them, doth hereby for himself, his heirs, executors, and administrators, and as, to, and concerning only his own acts, deeds, and defaults, covenant, promise, and agree to and with the said [*purchaser*], his heirs and assigns, in manner following; that is to say; that they the said [*three vendors*] respectively, shall or will, at the proper costs and charges of the said [*purchaser*], his heirs or assigns, as of Michaelmas Term now last past, or in or as and before the end of Hilary Term now next ensuing, acknowledge and levy unto the said [*purchaser*] and his heirs, before his Majesty's Justices of the Court of Common Pleas at Westminster, one or more fine or fines *Sur conuzance de droit come ceo*, &c., with proclamations to be thereupon had and made, according to the form of the statute in that case made and provided, and to be engrossed and recorded according to the order and course of fines in such cases used and accustomed, of ALL THAT close, piece, or parcel of ground, with the appurtenances,

Covenant by three severally to levy a fine *sur conuzance de droit*, at purchaser's expense, of

Parcels.

now commonly called or known by the name of L. Close, otherwise L. Shot, which said close contains by estimation acres, (be the same more or less), and which said close is situate, lying, and being in the parish of K., in the county of M., and is bounded on the north by the public road leading from to , on the east and south by land sometime since purchased by the said [*purchaser*] of [*A. B.*], and now in the possession of the said [*purchaser*], or his tenants; and on the west, by a road leading from the said public road into the land so purchased by the said [*purchaser*] of the said [*A. B.*]. And *it is hereby agreed* by and between the parties to these presents, as far as they respectively are interested, that the said fine or fines so as aforesaid, or in any other manner, or at any other time or times levied, or to be levied [; and all and every other fine or fines, common recovery or recoveries, and other assurances whatsoever, at any time or times heretofore, and to be at any time, and from time to time hereafter acknowledged, levied, suffered, made, and executed, of and concerning the said close and hereditaments hereinbefore described, or any of them, or any part thereof,] by or between the said parties to these presents, or any of them, either alone, or jointly and together with any other person or persons whomsoever, or to which they, or any or either of them, is, or are, or shall or may be parties or privies, or party or privy, shall be and enure, and shall be adjudged, deemed, expounded, construed, and taken to be and enure; [and was and were meant and intended, and is and are hereby directed and declared to be and enure; and the conuzee or conuzees named, and to be named, in the said fine or fines, and every of them, and his and their heirs, and all and every other person or persons respectively, to whom the said fine or fines, recovery or recoveries, and other assurances respectively, have or hath been, or shall or may be levied suffered, made, and executed, shall severally and respectively stand and be seised,] *As to, for, and concerning* the said close, piece, and parcel of land and hereditaments hereinbefore particularly mentioned, and in part described to be situate in the said parish of K., and every part and parcel of the same, with the appurtenances, To

COVENANT TO LEVY FINE, WHERE LAND HAD BEEN DESCRIBED IN WRONG PARISH.

Declaration of the use of the fine.

Uses to prevent dower.

COVENANT TO LEVY FINE, WHERE LAND HAD BEEN DESCRIBED IN WRONG PARISH.

THE USE of such person or persons, for such estate or estates, and for such interest or interests, by way of annuity, rent charge, or otherwise, and in such parts, shares, and proportions, and upon such trusts, and for such ends, intents and purposes, and charged and chargeable in such manner, and either absolutely or conditionally, and subject to such powers of revocation and of new appointment, and other powers, provisoes, conditions, restrictions, limitations, declarations, and agreements as the said [*purchaser*], at any time or times, and from time to time, by any deed or deeds, to be sealed (*a*) and delivered by him in the presence of one, two, or more credible witness or witnesses, and attested by the same witness or witnesses, shall direct, limit, or appoint: *And* in default of such direction, limitation, or appointment; and in the mean time, and from time to time, until the same shall take effect; and from time to time, subject to such uses, estates, trusts, charges, and interests, as shall have been directed, limited, or appointed by the said [*purchaser*], then To THE USE of the said [*purchaser*] and his assigns, for and during the term of his natural life: *And* from and after the determination of that estate, by any means, then To THE USE of the said [*trustee to prevent dower*], his heirs and assigns, during the natural life of the said [*purchaser, Upon trust* for, and for the sole benefit of the said [*purchaser*] and his assigns; *And* to the intent that the present or any future wife of the said [*purchaser*] may not be entitled to dower: AND from and after the determination of the estate hereby limited to the use of the said [*trustee to prevent dower*], his heirs and assigns, for the life of the said [*purchaser*], then To THE USE of the said [*purchaser*], his heirs and assigns for ever; and to, for, and upon no other use, trust, intent, or purpose whatsoever. AND each of them the said [*three vendors*] severally, separate and apart from the others of them, doth hereby for himself, his heirs, executors, and administrators, and as to and concerning only the acts, deeds, and defaults of himself, his heirs, executors, and administrators, covenant,

Covenant by three severally, separate from the others, and only as to the acts of himself, his heirs, &c.

"Signed."

(*a*) *Vide ante*, Vol. II. 502, 505, as to the word "*signed.*"

declare, and agree to and with the said [*purchaser*], his heirs and assigns, that they the said [*three vendors*] respectively, and their respective heirs, executors, and administrators, shall and will, on his and their parts, well and truly observe, perform, fulfil, and keep all and singular the covenants, stipulations, and agreements contained in the said indenture of release, bearing even date with these presents, of and concerning the close and hereditaments comprised in that indenture, or therein described, in the same or the like manner, and to all intents and purposes, as if the same covenants, stipulations, and agreements had been annexed to, or had been of and concerning the close and hereditaments comprised in these presents; *So* that the said covenants, stipulations, and agreements, or these presents and the covenants herein contained, may have the same or the like effect, in application to the close and hereditaments comprised in these presents, as if the same close and hereditaments had been the close and hereditaments described in the said indenture of release, bearing even date with these presents. In witness, &c. (*a*).

that covenantors respectively, and their respective heirs, &c. will perform the covenants in the recited release, concerning the close therein described, in the same manner as if the same covenants had been concerning the close herein comprised;

so that the said covenants may have the same effect as to the close herein comprised, as if the same close had been the close described in the release.

(*a*) [See *Townshend* v. *Champernown*, 1 Younge and Jerv. 531, which bears upon this deed.]

OF DEEDS, DESTROYED BY FIRE.

CONFIRMATION *of Mortgage Deeds destroyed by Fire* (*a*).

Parties.

THIS INDENTURE, made the day of , 18 : BETWEEN [F. W. and I. H. [*two trustees*], of,

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(*a*) CASE FOR THE OPINION OF MR. TIDD.

An attorney, or any other person, is not answerable for deeds accidentally burnt while in his custody, unless they were wrongfully withheld from the owner.

Mr. A. B. an attorney and solicitor, and who practised as an agent in conveyancing, or conveyancer, had in his custody on the 1st October, 1813, deeds and writings of various denominations. One part of them left with him in the character of attorney, solicitor, or agent: not agent for another, as in the case of common law or equity, from country to town, but in his proper business for preparing marriage settlements, conveyances, and mortgages; for carrying sales into effect; for preparing contracts for sales, leases, and other business. Other part, on which he had liens for bills of costs and professional charges. Other part, for which he was sole trustee, or trustee jointly with others. Other part, consisting of deeds and writings, for which clients had sent or applied a short time previous to the 1st October, but which had not been sent. Others which remained in the office, belonging to clients and others, who had not sent for them, and upon which Mr. B. had no professional claim.

On the 1st October a fire broke out which destroyed nearly all the deeds and writings, and the greater part of Mr. B.'s bills of law charges, by which his means of making many discoveries were taken away.

The circumstances of the cause of the fire cannot be discovered; but is supposed to have arisen from a spark from a candle obscured among the papers, as the clerk, according to a usual caution, delivered his candle to a servant of the house. And it happened, that the office was distant from the house about fifty feet, being separated therefrom

OF DEEDS, DESTROYED BY FIRE.

&c. devisees in trust, named in the last will and testament of [*mortgagor*] late of, &c. (deceased), of the first part; [*heir*] of, &c. (the only son and heir at law, and also devisee for life, and executor named and appointed in and by the last will and testament of the said [*mortgagor*], deceased), of the second part; and [*mortgagee*], of the third part. WHEREAS certain indentures of lease and release, bearing date respectively the and days of

Recital of indentures of lease and release.

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by a garden, planted with trees, and without any possible communication. The clerk left the office (as he supposed in perfect safety) at eight o'clock, and the fire was not perceived until near eleven that night.

In order to supply the defect of deeds and writings, it is at present conjectured, that it may be necessary to levy fines, execute deeds declaring uses, to pass private acts of parliament, and pursue other means to rescue the legal and equitable rights of the persons interested in the several estates to which the destroyed deeds had relation, and which of course will be attended with considerable expense.

Your opinion is desired, whether this is such a case as to make Mr. B. liable to the above expense, or any other consequential damages arising from the accident of the fire; whether the same be from actions of trespass, in ejectment, suits in equity, or any other means which adverse claimants might make use of, on their discovering that the deeds and writings concerning their supposed interests are destroyed.

OPINION.

"The rule of the law in cases of this nature is, that if the person in whose custody the deeds and writings are deposited, take as much care of them as a prudent man would take of his own property, and they are notwithstanding burnt or destroyed by fire, he shall not be answerable for the consequences to the proprietor. I am therefore of opinion, there appearing to be no ground for charging Mr. B. or his clerk with any particular neglect, that this is not such a case as to make him liable for any expense, or other consequential damages arising from the fire, unless it could be proved that he wrongfully withheld the deeds and writings, for which his clients had sent or applied previous to the time when it happened; in which case, as to such of the deeds and writings only, it might be held, that he is liable for the expenses that

OF DEEDS, DESTROYED BY FIRE.

, in the year one thousand seven hundred and , were made and entered into by and between the said [*mortgagor*], deceased, and the said I. H., (as trustee for the said [*mortgagor*],) of the one part, and the said [*mortgagee*] of the other part: AND which indentures, according to copies made and retained thereof, were in the words or figures, and to the effect following; that is to say; *First*, the indenture of lease, as follows; "THIS INDENTURE, made," &c. (*insert the lease*, verbatim, *to* "day and year first above written.") *And secondly*, the said indenture of release, as follows; that is to say; "THIS INDENTURE, made," &c. (*insert the release* verbatim, *to* "day and year first above written.") AND on which said indenture of release was indorsed a receipt for the said consideration money, or sum of thousand pounds, signed by the said [*mortgagor*]. AND the aforesaid indentures of lease and release, hereinbefore set forth, were duly executed by the said [*mortgagor*] and I. H. respectively, and the said receipt indorsed as aforesaid, was signed by the said [*mortgagor*], deceased, in the presence of and witnessed by R. W. of Lincoln's Inn, and S. B., then clerk to the said [*mortgagee*], who were the witnesses attesting the due execution of the same indentures respectively, and the signing the said receipt. AND WHEREAS another or further indenture was entered into and executed by and between the said [*mortgagor*], the father, and the said [*mortgagee*], (by indorsement on the said indenture of release): AND which further indenture was in the words or figures, and to the effect following; that is to say; "THIS INDENTURE, made," &c. (*insert the further charge* verbatim, *to* "day and year first above written.") AND WHEREAS the said last mentioned indenture, being duly

and which according to copies thereof were as follows;

Exemplification of lease for a year.

Exemplification of release.

Recital that receipt for consideration money was indorsed on release and signed by mortgagor:

that lease and release were executed by mortgagor and trustee, and receipt signed in presence of R. W. and S. B.

Recital of indenture of further charge as follows;

Exemplification of further charge.

Recital that further charge

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may be incurred, or damages arising in consequence of their not being delivered up when sent for *.

"W. TIDD.

"Temple, October 6th, 1813."

* The principle of the above opinion is equally applicable to any other person as well as an attorney, who has the deeds of another in his custody. *Vide ante*, Vol. I. 2, (*b*) *ad ultimo*.

OF DEEDS, DESTROYED BY FIRE.

stamped, was sealed and delivered by the said [*mortgagor*], party thereto (*b*),) in the presence of and attested by the said R. W. and S. B., and a receipt was at the same time given, and also signed by the said [*mortgagor*], for the sum of thousand pounds, the consideration in the said last mentioned indenture, and witnessed by the same witnesses. And whereas the said [*testator*] departed this life on or about the day of one thousand eight hundred and , having previously duly made and published his last will and testament in writing, (executed and attested as by law required to pass real estates) bearing date on or about the day of , one thousand eight hundred and , and thereby gave and devised all his freehold messuages, lands, tenements, and hereditaments, situate and being in the several counties of , or elsewhere, unto and to the use of his wife (since deceased), and the said [*two trustees*], and their heirs, *Upon trusts* for raising certain sums of money since raised and paid; *And* subject thereto, *In trust* for his son the said [*heir*], (party hereto), for life, without impeachment of waste; remainder to his first and other sons successively, in tail made; with remainders over, in the manner therein mentioned: *And* appointed his said wife and son executrix and executor of his said will. And the said testator afterwards died, without revoking or altering his said will; whereupon the said [*heir*] the son, alone duly proved the same in the Prerogative Court of the Archbishop of Canterbury. And whereas the widow of the said testator is since dead, leaving the said [*two trustees*] her surviving: And the said [*heir*] the son, is married, and hath [ ] his eldest son, now an infant, and two other children. And whereas default was made in payment of the said two several sums of thousand pounds and thousand pounds so lent and advanced to the said [*mortgagor*] the father, and secured by the said several indentures of mortgage, and further charge hereinbefore set forth, or intended so to be; whereby the estate and interest of the said [*mortgagee*], of and in the said mortgaged premises, became absolute at

was executed by mortgagor in the presence of and attested by R. W. and S. B. and receipt for consideration signed and witnessed.

Recital of mortgagor's death, having first made his will, and thereby devised all his lands to trustees.

Upon trust to raise monies since raised; and subject thereto, in trust for heir for life, without waste; remainder to first and other sons; with remainder over:

appointment of executors:

death without revoking will:

death of widow:

that heir is married, and hath three children;

that default was made in payment of mortgage monies;

(*b*) The father and the son were of the same Christian name.

OF DEEDS, DESTROYED BY FIRE.

law. And whereas the said indenture of mortgage, and the indenture by way of further charge, thereon indorsed, and the indentures of lease and release, bearing date respectively the seventh and eighth days of , one thousand seven hundred and , and the indenture of bargain and sale, bearing date the same eighth day of therein recited and referred to, with other the title deeds of the said [*mortgagor*], deceased, to the aforesaid estate and hereditaments, were burnt, and nearly the whole thereof consumed or destroyed by the calamity of fire, which accidentally happened in and destroyed the office of the said [*mortgagee*], situate behind his dwelling house, in, &c. on the night of the day of now last past: *But* the aforesaid deeds or indentures of lease and release and mortgage, and the said other indenture of further charge indorsed on the said indenture of release, are hereinbefore set forth from true copies retained thereof respectively, by and on the behalf of the said [*two trustees*] as trustees as aforesaid, and now remaining in the possession of their solicitors, Messrs. W. and B. of Lincoln's Inn, as they the said [*heir*] and [*two trustees*] respectively do hereby acknowledge and admit. And whereas the said two several sums of thousand pounds and thousand pounds still remain due and owing to the said [*mortgagee*] upon or under the said several indentures of lease and release and mortgage, and indenture of further charge: And in consequence of the destruction of the same indentures respectively in manner aforesaid, he the said [*mortgagee*] hath applied to and requested the said [*two trustees*], as such trustees as aforesaid, and also the said [*heir*], party hereto, to acknowledge and admit the due execution and validity of the said indentures respectively; and that the above are true transcripts or copies thereof; which they have agreed to do. Now therefore this Indenture witnesseth, that in pursuance of the said agreement they the said [*two trustees*], (so far as they lawfully or equitably can or may as such trustees as aforesaid); and also the said [*heir*] (party hereto) as such heir at law and devisee as aforesaid, for themselves severally and respectively, and for their several and respective heirs, executors, and administrators *do*,

that the deeds here exemplified, and the other title deeds of mortgagor, were consumed by a fire, which accidentally happened in mortgagee's office:

that the deeds herein exemplified are set forth from copies retained by the trustee's solicitors:

that mortgage monies are still due.

that mortgagee hath requested trustees and heir to admit the due execution and validity of the deeds, and that the above are true copies.

Testatum. Trustees and heir admit and acknowledge, that the deeds exemplified were to the tenor and effect hereinbefore set forth;

and each and every of them *doth* hereby admit and acknowledge, *That* the said hereinbefore recited indentures of lease and release and mortgage, and the said recited indenture of further charge, were to the tenure and effect, or in the words and figures hereinbefore set forth: AND that the same several indentures were respectively duly executed, and the receipts indorsed on the said indentures of release and further charge respectively, signed by the said [*mortgagor*], deceased, in the presence of, and attested by credible witnesses: and that the above transcripts or copies of the same indentures and receipts respectively shall be allowed and admitted, or deemed and taken as full and complete evidences thereof, and shall and may be acted upon; and all remedies and means pursued with regard thereto, both at law and in equity, in like manner and as effectually as if the said original indentures thereof had not been burnt or destroyed, any law, custom, or other matter or thing to the contrary thereof notwithstanding. IN WITNESS (*c*), &c.

OF DEEDS, DESTROYED BY FIRE.

and were duly executed, and the receipts indorsed on the release, and further charge signed by mortgagor in the presence of and attested by credible witnesses; and that the above transcripts shall be complete evidence thereof, and all remedies pursued with regard thereto, as effectually as if the originals had not been burnt.

(*c*) Stamp 1*l.* 15*s.*, and progressive duty 1*l.* 5*s.*, as a deed "not otherwise charged."

W. Pople, Printer,
67, Chancery Lane.